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Supreme Court of the United States

OCTOBER TERM, 1956

~~No. 833~~ 90

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, AND JACK BENNY, PETITIONERS,

vs.

LOEW'S, INC. AND PATRICK HAMILTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 13, 1957

CERTIORARI GRANTED APRIL 29, 1957

No. 14928

United States
Court of Appeals
for the Ninth Circuit

JACK BENNY, Appellant,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON, Appellees.

COLUMBIA BROADCASTING SYSTEM, INC., and AMERICAN TOBACCO COMPANY, Appellants,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON, Appellees.

Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court, Southern District of California, Central Division

Civil No. 15602

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON, Plaintiffs,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation; COLUMBIA BROADCASTING SYSTEM, INC., OF CALIFORNIA, a corporation; AMERICAN TOBACCO COMPANY, a corporation; JACK BENNY, JOHN DOE; RICHARD ROE; CORPORATION ONE; CORPORATION TWO; CORPORATION THREE; DOE and ROE, a co-partnership; BROWN and BLUE, a co-partnership, Defendants.

COMPLAINT

(Infringement of Copyright and Unfair Competition)

Plaintiffs complain of the above-named defendants as follows:

First Count

I.

This cause arises under the Copyright Laws of the United States and is, therefore, a case of which this Court has jurisdiction under and by virtue of the provisions of Title 28, section 1338(a) of the United States Code. [2]

II.

At all times herein mentioned plaintiff Loew's

Incorporated (hereinafter for convenience referred to as "Loew's") has been and is now a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and duly qualified to transact and transacting business in the State of California and within the Southern District of California.

III.

At all times herein mentioned defendant Columbia Broadcasting System, Inc. has been and is now a corporation duly organized and existing under and by virtue of the laws of the State of New York and duly qualified to transact and transacting business in the State of California and within the Southern District of California. At all times herein mentioned defendant Columbia Broadcasting System Inc. of California has been and is now a corporation duly organized and existing under and by virtue of the Laws of the State of California and transacting business within the Southern District of California.

IV.

At all times herein mentioned defendant American Tobacco Company has been and is now a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey and duly qualified to transact and transacting business in the State of California and within the Southern District of California.

V.

At all times herein mentioned defendants Corporation One, Corporation Two and Corporation

Three, and each of them, have been and are now duly organized corporations doing business in the State of California and within the Southern District of California; and defendants Doe and Roe, and Brown and Blue, and each of them, have been and are co-partnerships, composed of persons whose names are unknown to plaintiffs, doing business in the State of California and [3] within the Southern District of California under firm or common names which are unknown to plaintiffs. Defendants John Doe, Richard Roe and the other defendants in this paragraph V named are sued herein under fictitious names for the reason that their true names are unknown to plaintiffs; but their true names will be inserted herein when they are ascertained.

VI.

Prior to March 26, 1946 plaintiff Patrick Hamilton created and wrote an original dramatic composition or play entitled "Gas Light" and plaintiff Loew's created and produced an original motion picture photoplay entitled "Gas Light" based upon and adapted from said play.

VII.

On or about March 26, 1946 Loew's complied in all respect with the copyright laws of the United States and all other laws thereof governing copyright, and secured the exclusive rights and privileges in and to said motion picture photoplay, and received from the Register of Copyrights a certificate of registration therein and thereto. At all times material herein Loew's has been and still is

the proprietor of all rights, title and interest in and to said copyright.

VIII.

On or about January 1, 1952 defendants produced a play entitled "Gas Light" which they copied in substantial part from the motion picture photoplay "Gas Light" without the knowledge or consent of plaintiffs. Since that time defendants, without consent of plaintiffs, have produced and performed and permitted others to perform said play, under the title "Gas Light" upon television, have broadcast and telecast and have caused and permitted others to broadcast and telecast said performance over television to the public throughout the United States; have photographed, reproduced and [4] recorded said performance upon motion picture film and have performed, displayed, produced and exhibited said motion picture, recordation and production of said performance; and have caused and permitted others to perform, display, produce and exhibit said motion picture recordation and production of said performance to the public throughout the United States; all for the purpose of profit to defendants. Defendants, unless restrained and enjoined by this Court will continue so to perform, display, produce and exhibit said performance and the motion picture recordation and production thereof.

IX.

On or about January 30, 1952 Loew's notified defendants that they had and were infringing Loew's said copyright but defendants continued and continue to infringe said copyright.

X.

By reason of their bulk it is impractical to attach a copy of the copyrighted work or of the infringing work hereto, but copies thereof will be made available and exhibited to the Court at all appropriate proceedings herein.

Second Count

I.

Plaintiffs refer to paragraphs I to VIII, both inclusive, and paragraph X of their first count herein and incorporate the same by reference.

II.

On June 9, 1953 defendants announced, and plaintiffs first learned, that commencing on June 11, 1953 defendants planned and intended to produce a motion picture photoplay entitled "Gas Light" based upon and copied in substantial part from the motion picture photoplay of which Loew's is the copyright proprietor, and to distribute, perform, display and exhibit said copied motion picture [5] photoplay to the public throughout the United United States for profit to themselves, and plaintiffs are informed and believe and therefore allege that unless restrained by this Court defendants will proceed so to do.

III.

On June 9, 1953 Loew's notified defendants that the announced and intended acts hereinabove in paragraph II of this count alleged would be and are an infringement of its said copyright, but de-

fendants, as plaintiffs are informed and believe, continue and will continue to proceed with said acts.

Third Count

I.

Plaintiffs refer to paragraphs I to IX, both inclusive of their first count herein, and paragraphs II and III of their second count and by said reference incorporate them herein.

II.

For many years Loew's has used and still uses the trade-name of Metro-Goldwyn-Mayer as the name and designation of its motion pictures. Said trade-name has acquired, for many years has had and now has a secondary meaning throughout the United States and the world, as designating, referring to and identifying only motion pictures produced, released, distributed and exhibited by Loew's.

III.

The motion picture photoplay "Gas Light" of which Loew's is the copyright proprietor, was and is being extensively released, distributed, performed, displayed, exhibited, advertised and exploited throughout the United States and the world under said title. Said title has acquired and at all times material herein has had and now has a secondary meaning throughout the United States and elsewhere, as designating, referring to and identifying only the [6] motion picture photoplay of that title produced by Loew's as aforesaid.

IV.

In connection with and as part of the acts herein complained of defendants have used and will continue to use said trade-name "Metro-Goldwyn-Mayer" and said title "Gas Light" as designating, referring to and identifying the performance and the reproductions and recordations thereof hereinabove complained of, to the irreparable damage of Loew's.

Wherefore, plaintiffs pray that:

1. A temporary restraining order be issued herein enjoining and restraining defendants, their agents, representatives, licensees, employees and servants, and each of them, pending the hearing of an application for a preliminary injunction, from producing, recording, photographing or publicly performing, displaying, exhibiting or otherwise infringing Loew's copyright therein and from using in any manner the trade-name "Metro-Goldwyn-Mayer" or the title "Gas Light" or any colorable copy, simulation or imitation thereof.

2. An order to show cause be issued herein directing defendants to be and appear before this Court at a time and place to be fixed in said order, to show cause why they should not be enjoined and restrained pendente lite as hereinabove in paragraph 1 of this prayer specified.

3. Defendants, their agents, representatives, licensees, servants and employees be permanently enjoined as hereinabove in paragraph 1 of this prayer specified.

4. Defendants be required to pay plaintiffs such damages as the latter has sustained by reason of defendants' acts and to account to plaintiffs for all gains, profits and advantages derived from said acts, or any of them. [7]

5. Plaintiffs have such other and further relief as to the Court may seem proper.

LOEB & LOEB,
/s/ By HERMAN F. SELVIN,
/s/ By ALLEN E. SUSMAN,
Attorneys for Plaintiffs [8]

[Endorsed]: Filed June 10, 1953.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon reading and filing the complaint, and the affidavit of R. Monta, herein, and good cause therefor appearing,

It Is Ordered that the defendants herein be and appear before this Court at its courtroom in the United States Postoffice and Court Building, Los Angeles, California, on the 19th day of June, 1953, 10 a.m., then and there to show cause, if any they have, why an injunction pendente lite should not be issued as in said complaint prayed.

And, it appearing from said complaint and affidavit that [9] said defendants threaten to commit

certain acts which will be an infringement of the copyright of plaintiff Loew's Incorporated in and to a motion picture photoplay entitled "Gas Light" and that said acts will be completed before a hearing on an application for an injunction pendente lite can be had, thereby causing irreparable injury to said plaintiff,

It Is Further Ordered that, until June 19th, 1953, 5 p.m., said defendants, their agents, representatives, licensees, employees and servants, and each of them, be and they hereby are, and each of them is, enjoined and restrained from producing, recording, photographing, or publicly performing, distributing, releasing, displaying or exhibiting said motion picture photoplay "Gas Light" or any colorable copy, imitation or simulation thereof; and from using in any way the name "Metro-Goldwyn-Mayer" or the title "Gas Light" or any colorable copy, imitation or simulation thereof or of either of them.

It Is Further Ordered that the foregoing temporary restraining order shall not be effective until plaintiffs, or either of them, have given security in the amount of $1,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Dated and Issued: June 10, 1953 at 1:45 o'clock p.m.

/s/ JAMES M. CARTER,
District Judge

The security hereinabove provided for has been given.

Dated: June 10, 1953.

/s/ JAMES M. CARTER,
District Judge [10]

[Endorsed]: Filed June 10, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF RUDOLF MONTA

County of Los Angeles,
State of California—ss.

Rudolf Monta being first duly sworn deposes and says:

I am the executive of Loew's Incorporated (hereafter referred to as Loew's) in charge of problems pertaining to rights in literary, dramatic and musical properties. I am familiar with the matters hereinafter set forth.

In the year 1944 Loew's produced and thereafter released throughout the United States and in many foreign countries a feature length motion [11] picture entitled "Gaslight", at a cost to Loew's in excess of Two Million Dollars ($2,000,000.00). The picture enjoyed wide commercial and artistic success and is generally recognized as one of the finest motion pictures ever produced.

On many occasions Loew's, as well as other motion picture companies, release motion pictures for

later. distribution and exhibition after initial release. The right to such later performances, referred to generally in motion picture business as re-releases, is of great value to the owner of the picture. Moreover, it is a frequent occurrence in the motion picture business for the owner of a picture of merit such as "Gaslight", to remake the picture using varying portions of the original picture, and remake rights are recognized as being of great value to the owners of such pictures. Furthermore, use of motion pictures and of the various rights incident thereto in entertainment media other than motion picture exhibition is recognized in the motion picture industry as being of great value, particularly in connection with a successful motion picture such as "Gaslight".

In the year 1944 Loew's duly and regularly obtained a statutory copyright in the United States and copyright throughout numerous other parts of the world on its picture "Gaslight" and ever since Loew's has been and it now is the copyright owner thereof.

On or about January 27, 1952 the Jack Benny Television Program, which was and still is sponsored by the American Tobacco Company, and which was shown over the nationwide television facilities of the Columbia Broadcasting System, by way of both a "live show" or direct broadcast, as well as by way of a "kinescope" or motion picture filming, was largely devoted to performance of a television version of "Gaslight". Said use of "Gas-

light" on the Jack Benny program was made without Loew's knowledge or consent.

The aforesaid conduct of Mr. Benny, the American Tobacco Company, and the Columbia Broadcasting System, Inc., constituted and constitutes an infringement of Loew's rights in and to "Gaslight", as is made evident from the "Revised Script" of said television program and the [12] "Dialogue Cutting Continuity" of "Gaslight", true and correct copies of both of which documents are being lodged with the Court concurrently herewith. Further, and for the purpose of ready reference by the Court, there is attached as Exhibit "A" hereto and incorporated herein, an outline of some of the prominent similarities between the television performance and Loew's motion picture.

Following the aforesaid television exhibition of January 27, 1952 Loew's promptly notified said defendants that it had learned of said infringement and that it intended to protect its legal rights in the premises.

No further use, or contemplated use, by defendants, after the exhibition of January 27, 1952 of "Gaslight" was known to Loew's until Tuesday, June 9, 1953. On that date an article appeared in the "Daily Variety", a well known publication devoted to news of the entertainment business, regarding defendants' intention to make further use for their profit, and in derogation of Loew's rights, of "Gaslight". A true and correct copy of said newspaper article is attached hereto as Exhibit "B" and

is incorporated herein by this reference. The action of defendants referred to in said article has been and is without Loew's consent.

Immediately upon reading said newspaper article, Loew's sent to Jack Benny, American Tobacco Company, and the Columbia Broadcasting System, Inc. a telegraphic notice advising said defendants that their use of "Gaslight" constituted an unlawful invasion of Loew's rights and that all proper measures would be taken in protection thereof. A true and correct copy of said telegram is attached hereto as Exhibit "C" and is incorporated herein by this reference.

Up to the time of execution of this Affidavit none of said defendants has replied to said telegraphic notice or has advised Loew's that the production referred to in the Daily Variety article will not proceed as there set forth.

I am informed and believe and therefore state that normally production of a picture such as that referred to in the Daily Variety article requires only one day to complete, and that unless a temporary [13] restraining order enjoining defendants and each of them from proceeding with their contemplated production is issued forthwith defendants will go forward with their said production of "Gaslight" and will thereby cause great and irreparable injury to Loew's in that its reissue, remake and other rights in and to "Gaslight" will be substantially decreased in value, and by reason of the matters heretofore set forth in this Affidavit and in the

Complaint herein. Furthermore the issuance of said restraining order will preclude any contention by defendants that Loew's has not proceeded with all due dispatch, and will maintain and preserve the respective rights of the parties without unnecessary expenditure by defendants of substantial sums for production costs and until such time as a full and complete determination may be had of the issues herein.

/s/ RUDOLF MONTA

Subscribed and Sworn to before me this 10th day of June, 1953.

[Seal] /s/ ALICE L. BAKER,
Notary Public in and for said
County and State [14]

Similarities between Jack Benny television version of "Gaslight" and Loew's Incorporated motion picture.

I. Generally

	BENNY TV PROGRAM	MGM's "GASLIGHT"
1.	Locale: London (p.6)	London (p.1)
2.	Period: 1871 (p.6) when story begins.	"Early 1870's" when story begins.
3.	Main setting: Gloomy old 4-story house. (p.6)	Gloomy, old 4-story house (p.1)
4.	Characters:	
	(a) Husband "CHARLES Manningham" (played by Benny) murdered a woman 15 years ago in this very house; married present wife so that "in the guise of an English gentleman" he can pursue search for jewels of murdered woman. He is following plan of driving his wife insane. He goes out nightly, sneaks back into attic to search. Is finally captured by man from Scotland Yard.	(a) Husband, "Gregory Anton" (played by CHARLES Boyer) murdered a woman 10 years ago in this very house; married present wife (who inherited house) so he can pursue search for jewels of murdered woman. He is following plan of driving his wife insane. He goes out nightly, sneaks back to attic to search. Is finally caught by man from Scotland Yard.
	(b) Wife, "BELLA Manningham" much in love with husband; pained that he leaves her alone night after night; worried she is losing mind; asks for his sympathy; she is victim of husband's plan to drive her insane; learns of husband's past when Inspector visits her; asks to see husband alone before he is taken away, and taunts him then calls Inspector.	(b) Wife, "PAULA Anton" much in love with husband; pained that he leaves her alone nightly; fears that she is losing mind; asks for husband's sympathy; Ditto.
	(c) Scotland Yard Inspector. "INSPECTOR" (Played by Noble) Has been watching house for some time; comes to call on wife when husband out; tells her of husband's past, the murder of a woman in this house years ago; in talking with wife, Inspector gets her to admit she knows it is her husband prowling in the attic who makes strange noises there at night. Upon return of husband, Inspector has hidden, but appears when husband is bullying wife; places husband under arrest; allows wife to talk with husband alone a few moments while he waits outside door, then at her call, comes back and takes husband away into custody. We feel there is affection between Inspector and wife.	(c) Scotland Yard Inspector "Brian Cameron" (Played by Joseph Cotten) Ditto.

(d) Maid "ELIZABETH" questioned by husband about picture out of place; denies touching it.	(d) Maid "ELIZABETH" Ditto.
(e) Other servant in house: Butler, "Jeeves".	(e) Other servant in house: Maid, "Nancy".

II. Story Points.

5.

(a) Husband pursuing a sinister, diabolical scheme to drive wife crazy. (p.7 TV) (p. 102 script)

(b) Husband murdered a woman years ago in this very house. (p.17TV) (p.102 script)

(c) Husband marries present wife, comes to this very house, so he can search for jewels of murdered woman, in attic. (p.17 TV) (p.105 script)

(d) In order to search, husband leaves wife night after night, and pretends he is going elsewhere, actually coming back to own attic. (p.14,15 TV) (p.65,65A,65B,script)

(e) Husband's method of driving wife insane, includes following -

(1) Telling her she is always forgetting things:
TV program: Wife "doesn't remember" things she does, husband tells her, p.9,12,14,21.
MGM script: Wife inclined to lose things and forget things, husband tells her, p.35,43,59,[illegible]A.

(2) Puts picture(s) out of place, then accuses wife of having done this and forgotten it:
TV program: Turns 2 pictures upside down. (p.11,12)
MGM script: Takes little picture off wall and hides it. (p.60,61)

(3) Confines wife to her room, and he goes out night after night.
TV program: p.14,15,7,10.
MGM script: p.64,65,65A.

(4) Humiliates wife in front of servant(s) by calling her in to be questioned when picture found out of place.
TV program: p.12 (Maid, Elizabeth, is quizzed)
MGM script: p.61,60 (Maids, Elizabeth and Nancy are quizzed)

(5) Husband's searching for jewels in attic, has following effects which increase idea of wife's insanity:

(a) When he turns on gaslight in attic, lights in her room go lower; then later when he turns off gaslight in attic, her lights in her room come up higher again.
TV program: Lights go dim, p.16; lights up again, p.18.
MGM script: " " " p.97; " " " p.98.

(b) His search in attic (makes queer noises) (has queer effect).
TV program: Wife complains of headaches, but when Inspector explains her husband was up in attic searching for jewels she says her headache is gone.
MGM script: Wife thinks she's hearing imaginary footsteps in attic.

(f) Husband calls in servants, after he has misplaced picture, questions them, in order to cast suspicion on his wife. (p.12 TV) (p.60,61 script)

(g) Husband tells wife she is getting hysterical, and should sit down and calm herself: (p.10,11 TV) (p.61 script)

(h) Husband asks why wife does these crazy things; says she is insane:
(p.12,21 TV) (p.82 script)

(i) Running idea that wife forgets things:
(p.9,12,14,21 TV) (p.35,43,59,83A script)

(j) Gimmick of gaslights going down after husband leaves, and coming up just before he returns:
(p.16,18 TV) (p.97,98 script)

(k) Running gag and whiplash tagline: "WELL!"
(p.4, TV and was at end of film we saw, but not written into script of the TV show) Benny & Noble;
(p.13,48,93,127 script)

(l) Wife pleads for sympathy and kindness from husband:
(p.10 TV) (p.65,65A script)

(m) Inspector from Scotland Yard, has been watching house, comes to visit wife when husband out, tells her of husband's dark past, reassures her of her sanity, captures husband,
(p.17,18,19,23 TV) (p.44-48,50,58,59,93 script)
(I) Watching house - (p.17 TV) (p.44-48,50,59,93,96 script)
(II) Visits wife: (p.17 TV) (p.93 script)
(III) Tells of husband's crime (p.17 TV) (p.102 script)
(IV) Reassures wife of sanity- (p.19 TV) (p.96 script)
(V) Captures husband (p.23 TV) (p.117 script)

(n) Husband returns, starts to bully wife again, when Inspector comes on scene.
(p.23 TV) (p.112,113 script)

(o) Wife asks to speak to husband, alone before Inspector takes him away; Inspector finally agrees and waits outside room within call. (p.24 TV - Inspector ties up husband because wife asks to talk with him alone)
(p.117,118 script - Inspector already had tied husband up.)

(p) Husband, tied up in chair, tries to talk wife into getting knife and cutting him loose.
(p.24,25 TV - knife in desk)
(p.119 script - knife in cupboard)

(q) Wife pretends she is going to release husband by cutting bonds with knife, then frightens him by implying instead she will kill him with the knife, then calls Inspector.
(p.25,26 TV) (p.121,122 script)

III. Dialogue.

BENNY TV PROGRAM	MGM's "GASLIGHT"
(a) Husband tells wife she is hysterical and should calm herself: p.10,11 dialogue: Husband: "Now, now Bella, control yourself. You're getting hysterical. I'll have the maid bring you a sedative."(Pulls bell cord) "Now just sit here for awhile and you'll feel much better."	p.61 dialogue: Husband: "Paula, will you stop being hysterical?" (He pulls bell cord) "Sit down and calm yourself before they come."
(b) Incident & dialogue re picture misplaced: p. 11, husband is talking to wife and pretending to be concerned about her welfare, when he stops talking, breaks off, starring:	p.60,61: husband is playing piano, pretending to be nice to wife, when he stops playing, asks her to "put things right again." "Look!"

(Similarities - Dialogue - Continued)

"That picture..that picture on the wall. Why did you turn it upside down?"
Wife: "Picture..upside..But I didn't..I didn't turn that picture upside down. It must have been someone else."
Then, on p.12 - Wife: "But I didn't do it, Charles..I told you..It must have been someone else."
p.12, husband says, "Someone else..Bella, are you suggesting the maid did it?"
Wife:"Yes,yes, the maid.."
Husband: "Very well, I'll find out. (he goes to bell cord).
Wife: "Charles, don't humiliate me in front of the servants, please."

Wife: "Yes, the little picture's been taken down. Who took it down? Why was it taken down?...But I haven't hidden it. I swear I haven't.. Why should I? Don't look at me like that. Someone else must have done it." "Oh, don't ring..Don't shame me before the servants!" (p.61)
Husband rings for servants, "WE must get to the bottom of this, once and for all.."Elizabeth comes in and he asks her if she notices anything missing.

(c) Husband quizzes maid about picture:
p.13: Maid:"Did you ring, Sir"
Husband: "Yes, Elizabeth..Those pictures on the wall. Did you turn them upside down?"
Maid: "Oh no, Sir. I never touched them."

p.61: Maid: "Do you want me, Sir?" Husband: Come in please, Elizabeth. Do you notice anything missing in this room..
p.62: Maid: "There's a little picture missing, Sir."
Husband: "Did you take it away?"
Maid: "Oh, no, sir."
Husband: "Have you ever taken it down from where it belongs?"
Maid: "No, sir. Why ever should I?"

(d) Husband goes out again after picture episode, leaving wife alone.
p.14: Wife, "Charles, Charles, you're not going out again, are you?"
Husband: "I have to. I have an appointment."..."At the tavern.."
p.15: Wife, "Charles, Charles. Every night he leaves me alone. I can't stand it any more.."
p.13:Wife, "Oh Charles, if the maid didn't turn the picture upside down, then I must have done it..but I don't remember.."

p.65-65A:Wife: "What are you going to do?" Husband: "I'm going out, to work, and to forget all this."
p.65B:Wife: "No,don't! Dont' leave me here all by myself now. I get so frightened here alone when you go out night after night." "Don't leave me. Stay with me.."
65A: Wife, "Gregory, if it was I who took that picture... then I don't know what I do any more."

(e) Implications that wife going insane:
p.7: Butler: "She's an odd one, isn't she?" Maid: "The master says if she gets any worse, he's going to send her away to a loon."

p.47: Miss Thwaites: "definitely odd."
p.66: Maid says to husband: "Seems to be getting worse, doesn't she sir?":

p.83A: Husband: "You've forgot-
ten him as you forget everythi
I am wrong to try to handle th
myself. The case is one for
people who know about such
things, Paula, we shall have
visitors - and shortly".
Wife: "A doctor?"
Husband, "Two, I think <u>two</u> is
the required number."
p.90: Policeman on beat tells
Scotland Yard man, that he had
breakfast in the kitchen of
Anton house...
"If you ask me, Nancy" (the
maid)'s getting ideas about 'er
station. It seems <u>the master 'ad
told 'er that 'er mistress might
be going away for quite a long
time</u>.."
p.112: Wife: "My mind is going"
Husband, "Haven't I told you?"

p.21: Husband: "You might as
well admit it, Bella, you're
losing your mind. Let me send
you away".

(f) <u>Wife confined to room by husband</u>:

p.7: Butler, "I thought the mas-
ter wanted Mrs. Manningham to have
supper in her room".

p.10: Husband, "What are you
doing out of your room? Answer
me, Bella, what are you doing
out of your room?"
Wife:"..I've been confined to my
room all day and it was driving
me mad..."

p.64: Husband, "And now, Paula,
I think you'd better go to
your room".
(She asks him to bear with her,
be kind..)
Husband: "Come Paula, you had
better go to your room."
(p.65-65A)

(g) <u>Wife pleads for sympathy, kindness
from husband, if she is going insane</u>:

p.10: Wife: "I need your sympathy..
your help..your tender understand-
ing." "Oh, my darling, my beloved..
only you can guide me through the
darkness of my confusion. Only you can
make me smile again..."

p.65-65A: Wife: "Gregory,
if it <u>was</u> I who took that
picture...if I do all these
senseless meaningless thing
then I don't know what I do anymore
so meaningless-then, if that
true, then you must be
gentle with me - bear with
me. Please, Gregory please"

(h) <u>Husband asking why wife does these
crazy things, and saying she is insane</u>:

p.12 ; Husband: "<u>Why do you keep
doing these things</u>?"
"Bella, oh my poor Bella, <u>you're
losing your mind</u>. Why don't you
let me send you away? You keep
turning the pictures upside down
and don't even remember."
p.21: Husb: "You might as well
admit it, Bella, you're losing your
mind. Let me send you away..."

p.82: Husband: "If I could only
get inside that crazy brain of
yours, and understand <u>what makes
you do these crazy</u>, twisted
<u>things</u>."
Wife: "Gregory are you <u>trying
to tell me I'm insane</u>?"
Husband: "It's what I'm trying
not to tell myself."

(i) Running idea that wife doesn't remember things:

p.9: Wife: "I don't even remember ordering anything like that (marinated salami - for dinner).
p.8: Wife: "..doing things I don't even remember."
p.14: "Did you hear that, Bella. Then it was you who did it." (turned picture upside down).
Wife, "But I don't remember."
Husb: "Don't remember..don't remember, You didn't remember last week when you put the horse in the closet... or 2 weeks ago when you put glue in my shaving cup..."

p.21: Husb: "No,no Bella, you're the one who's crazy. You keep going around..and then say you don't remember."

Running idea that wife forgets things, loses things:

p.35: Husb: "You might lose it (the brooch). You know, you're inclined to lose things, Paula."
Wife,"I am? I never realized it".
Husb: "Just little things..Now, you'll remember where it is?"
p.43: Wife,"I don't remember opening my bag..You did put it in there?"
Husb: "Don't you remember even that?"
p.59, Wife,"Have I forgotten?" (that they were going out tonite)
p.83A-Husb: "You've forgotten him as you forget everything."

(j) Running gag, and whiplash finish "WELL!":-

Benny and Don Wilson argue over commercial Benny wants him to do; when Don objects, Benny says, "WELL!" and Noble rejoins, "WELL!" This is p.4, start of running gag.

Whiplash -tagline-by Barbara & (servant? or was it Inspector?) "WELL!" "WELL!" but not in TV script given us. Was in film we saw.

Miss Thwaites, nosey neighbor of wife's, had first met her on train from Milan to Como, and when girl gets off train, and Gregory meets her, Miss T. exclaims as she watches their long kiss, "WELL!" (p.13)
Miss T. is watching from her house, and sees Scotland Yard man enter wife's home; exclaims "WELL!" (p.48 & 93)
Miss T. gets into Anton house nite when police are taking husband away; sees wife and Scot. Yard man in intimate conversation, exclaims, "WELL!" as whiplash to picture. (p.127)

(k) Gaslight goes down after husband leaves then comes up just before he returns:

p.16: "the gas lights are going dim again..every night he leaves me, the lights go dim.."the lights have come up again-quick, hide.."

p.97: "Every night when my husband goes out.."The light goes down..Later the gas goes up again and he comes back."

continued.....

EXHIBIT "B"

VARIETY

Tues., June 9, 1953

Jack Benny Reprising "Gaslight" on Telefilm

Jack Benny will film a repeat of his TV "Gaslight" skit with Barbara Stanwyck at General Service Thursday as one of the five filmed shows to be interspersed with live telecasts for Luckies next season. He will do one filmed show every Thursday until the five are completed.

Benny kicks off the new TV season Sept. 13 simultaneously with his radio series. First two video shows will be live to be followed by a filmed show. He'll telecast every third week instead of this season's monthly schedule. [21]

EXHIBIT "C"

[Telegram]

Straight Wire June 9, 1953

Mr. Jack Benny
1002 North Roxbury Drive, Beverly Hills, Calif.

Columbia Broadcasting System, Inc.
6121 Sunset Boulevard, Hollywood, Calif.

American Tobacco Company
111 Fifth Avenue, New York, N. Y.

We are advised that a repeat performance or remake by you of the television version of "Gaslight" heretofore performed on the Jack Benny show of January 27, 1952 over the CBS television network

is now being contemplated. Notice is hereby given you that we consider the prior performance and any subsequent performances or remakes thereof to constitute infringements of our rights in and to "Gaslight", and that we intend to enforce such rights by all proper remedies afforded by law.

Loew's Incorporated
By Marvin Schenck, Vice-President

[Endorsed]: Filed June 10, 1953.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES

I.

The alleged copying of a substantial part of plaintiff's photoplay is, of course, an infringement of the copyright.

17 U. S. Code, sec. 1;
Universal Pictures Co. vs. Harold Lloyd Corp., 9 Cir., 162 F.2d 354, 359-361.

II.

Use of plaintiff's trade-name, and the title of its photoplay, both of which have acquired a secondary meaning, is actionable unfair competition.

Jackson vs. Universal Pictures Co., 36 Cal. 2d 116, 121; 222 P. 2d. 433, 436-437, and cases there cited. [23]

III.

Injunction, in accordance with the general practice of equity, is an appropriate remedy to prevent as well as to restrain, copyright infringement; and the circumstances of this case require its use pendente lite.

17 U. S. Code, sec. 112;

Chappell and Co. vs. Fields, 2 Cir., 210 Fed. 864, 866 stating that "Preliminary injunctions are granted more readily in dramatic than in other cases because the delay involved in waiting for a final decree would generally amount to a denial of justice."

American Code Co. vs. Bensinger, 2 Cir., 282 Fed. 829, 835, stating that "Where the plaintiff has made a prima facie case in regard to the existence of a copyright and its infringement, a temporary injunction will, as a general rule, be issued * * *".

Respectfully submitted,

LOEB & LOEB,
/s/ By HERMAN F. SELVIN,
Attorneys for Plaintiffs [24]

[Endorsed]: Filed June 10, 1953.

[Title of District Court and Cause.]

ORDER MODIFYING TEMPORARY RESTRAINING ORDER

The parties appearing herein having entered into an oral stipulation in open court on June 11, 1953

with respect to modification of the temporary, restraining order heretofore issued by the Court on June 10, 1953, and the Court having orally approved said stipulation in open court,

Now, therefore, in accordance with said stipulation, and good cause therefor appearing,

It Is Ordered as follows:

1. Said stipulation for modification of said temporary restraining order, and this order of modification on, and each of them, is made without prejudice to any of the rights of the parties hereto.

2. This order of modification shall be deemed effective [25] as of 12 o'clock noon, June 11, 1953.

3. Defendants may produce, on June 11, 1953, before a studio audience only, a motion picture photoplay starring Jack Benny, which photoplay is claimed and alleged by plaintiff herein to constitute an infringement of the copyrighted motion picture "Gaslight", of plaintiff Loew's Incorporated.

4. The entire negative film of said Jack Benny photoplay of June 11, 1953 shall be delivered forthwith to the Hollywood, California film laboratories of Consolidated Film Industries, a division of Republic Pictures Corporation, shall be processed into a developed film negative at Consolidated Film Industries, shall be sealed immediately thereafter, and shall remain in the safekeeping and custody of Consolidated Film Industries at its Hollywood, California film vaults, until such time as this Court may otherwise order.

5. No prints or additional negative films what-

soever of said original developed negative film shall be made, until such time as this Court may otherwise order.

6. All scripts of said Jack Benny photoplay of June 11, 1953 shall be forthwith taken into and shall remain in the custody of defendants and/or their attorneys, except for such copies thereof as may be filed in Court or delivered to plaintiffs and/or their attorneys.

7. Except as otherwise expressly set forth in this order of modification, said temporary restraining order of June 10, 1953 shall remain in full force and effect.

Dated: June 12, 1953.

/s/ JAMES M. CARTER,
District Judge [26]

Approved as to form: Dated: June 12, 1953.

O'Melveny & Myers,

/s/ By W. B. Carman,
Attorneys for Defendants, Columbia Broadcasting System, Inc., and Columbia Broadcasting System, Inc. of California.

Wright, Wright, Green & Wright,

/s/ By Richard M. Goldwater,
Attorneys for Defendant Jack Benny

Loeb & Loeb,

/s/ By Harry L. Gershon,
Attorneys for Plaintiffs [27].

[Endorsed]: Filed June 12, 1953.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT JACK BENNY

Defendant, Jack Benny, for answer to the complaint herein, admits, denies and alleges as follows:

First Count

1. Denies each and every allegation contained in Paragraph I of said count except as follows: Admits that the claims stated in the first and second counts of the complaint arise under the laws of the United States relating to and governing copyrights.

2. Alleges that this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs V, VI and VII of said count, and each of them, except as follows: Admits that prior to March 26, 1946, plaintiff Loew's produced a motion picture photoplay entitled "Gaslight".

3. Denies each and every allegation contained in Paragraph [28] VIII of said cause of action, except as follows: Admits and alleges that on or about January 27, 1952, defendant American Tobacco Company sponsored, defendant Columbia Broadcasting System, hereinafter called "CBS" produced, and defendant Jack Benny performed in a play which was a burlesque of a motion picture photoplay entitled "Gaslight", and that said defendant CBS caused said burlesque to be shown over the television facilities of said defendant either at the time of said production or shortly thereafter by means of a television recording; alleges that on or

about June 11, 1953 defendant American Tobacco Company sponsored, defendant CBS produced, and defendant Jack Benny performed in a motion picture photoplay which was caused to be filmed by defendant CBS, as permitted by the order of the above entitled court, for the purpose of showing said photoplay over the television facilities of said defendant CBS; that said moton picture photoplay was a burlesque of the motion picture photoplay entitled "Gaslight"; that defendant CBS will, unless restrained and enjoined by this court, broadcast said burlesque over its television netword facilities; that the foregoing was done by defendants CBS, American Tobacco Company and Jack Benny, and each of them, for the purposes, among others, of entertainment of the public and profit to themselves.

4. Denies each and every allegation contained in Paragraph IX of said cause of action.

Second Count

5. Answering Paragraph I of said count, this answering defendant incorporates herein Paragraphs 1, 2 and 3 above as if fully set forth.

6. Denies each and every allegation contained in Paragraph II of said cause of action, except as follows: Admits and alleges that on or about June 11, 1953 defendant American Tobacco Company [29] sponsored, defendant CBS produced, and defendant Jack Benny performed in a motion picture photoplay which was a burlesque of the motion picture photoplay entitled "Gaslight". Alleges that this

answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations that Loew's, Inc. is the copyright proprietor of said motion picture photoplay entitled "Gaslight". Admits and alleges that defendant CBS plans and intends to display and exhibit said burlesque over its television network facilities for the purposes, among others, of entertainment of the public and profit to itself, and that defendant CBS will proceed to do so unless restrained by the above entitled court.

7. Denies each and every allegation contained in Paragraph III of said cause of action, except as follows: Admits and alleges that on or about June 9, 1953 plaintiff Loew's, Inc. addressed a telegram to defendants Jack Benny, CBS and American Tobacco Company, which reads as follows:

"We are advised that a repeat perfomance or remake by you of the television version of 'Gaslight' heretofore performed on the Jack Benny Show January 27, 1952, over the C.B.S. Television Network is now being contemplated. Notice is hereby given you that we consider the prior performance and any subsequent performances or remakes thereof to constitute infringements of our rights in and to 'Gaslight', and that we intend to enforce such rights by all proper remedies afforded by law."

Third Count

8. Answering Paragraph I of said cause of action, this answering defendant incorporates herein

Paragraphs 1, 2, 3, 4, 6 and 7 above, and each of them, as if fully set forth.

9. Alleges that this answering defendant is without knowledge or information sufficient to form a belief as to the truth [30] of the allegations contained in Paragraph III of said count.

10. Denies each and every allegation contained in Paragraph IV of said count, and specifically denies that plaintiff has been or will be damaged as alleged, or otherwise, or at all.

As and for his Affirmative Defenses herein, this Answering Defendant alleges:

First Defense to First, Second and Third Counts:

11. The play and motion picture photoplay complained of in said Complaint were burlesques of, and amounted to no more than fair use and fair criticism of, said motion picture photoplay of Loew's. No one viewing either the said play or the said photoplay complained of could reasonably believe he was viewing said photoplay of Loew's, or any part thereof; and the public showing of the said play and the said photoplay complained of did not and will not, satisfy in whole or in part any demand that may have existed, or that may now or hereafter exist, for said photoplay of Loew's.

Second Defense to First, Second and Third Counts:

12. Burlesque is a form of literary art which is as old as literature itself and its traditions are unbroken over the centuries. It has always been ac-

cepted and sanctioned as an established mode of literary criticism.

Burlesque, as a form of literature, characteristically takes serious elements from the subject of the burlesque and puts them into absurd or nonsensical form, using the comic tricks of exaggeration, inversion, inflation, deflation and transposition. It frequently uses the story or parts of the story of the work which is the subject of the burlesque and incidents and characters from such work, all of which it puts into absurd or nonsensical [31] form. The new form created by a burlesque has been recognized throughout the history of literature, as a form of literary art distinct and different from the literary work which is the subject of the burlesque.

Burlesque is a form of freedom of expression which flourishes in those societies where there is the most democratic liberty. There have been very few important plays, novels, verses or stories that have not been burlesqued at least once during their lifetime. Through the long millennia of western civilization the stage has always laughed at itself using burlesque as the vehicle for such laughter.

13. Burlesquing of motion pictures has, for many years, been an accepted custom in the broadcasting of entertainment over the air. Numerous entertainers, including Jack Benny, Fred Allen, Sid Ceasar, Imogene Coca, Jimmie Gleason, Bob Hope and Henry Morgan, have merrily spoofed various motion pictures by presenting, over the air, burlesques of such pictures. Since 1932, Jack Benny programs have presented twenty-six burlesques of motion pic-

tures distributed by plaintiff Loew's, Inc. and fifty-eight burlesques of motion pictures distributed by one or the other of the following distributors of motion pictures: Universal, R.K.O., United Artists, Twentieth Century-Fox, Warner Bros., Columbia and Paramount.

Said programs were original, novel and unique comedy programs which appealed to listening and viewing audiences throughout the United States because of humorous situations, dialogue and antics presented by defendant Benny and his supporting cast. Said programs ordinarly extended for one-half hour of broadcasting time including commercials, monologue, repartee, singing and the burlesque.

14. On or about October 14, 1945 a Jack Benny program, sponsored by defendant American Tobacco Company, was presented [32] over the national radio network of the National Broadcasting Company which included a burlesque of the M-G-M motion picture "Gaslight." On or about January 27, 1952 a Jack Benny program, produced by defendant CBS and sponsored by defendant American Tobacco Company, was presented over the national television network of defendant CBS which included, with modifications, said burlesque of the M-G-M motion picture "Gaslight." On or about June 11, 1953 defendant American Tobacco Company sponsored and defendant CBS produced a Jack Benny program in the form of a motion picture which was filmed for the purpose of using it as one of a planned series of Jack Benny programs

to be broadcast over the national television network of defendant CBS between September, 1953, and June, 1954. Said Jack Benny program included, with further modifications, said October 14, 1945 burlesque of the M-G-M motion picture "Gaslight".

The burlesques of "Gaslight" contained in all of said programs were the original creations of writers skilled in the literary art of burlesque. The script of said October 14, 1945 program was prepared by writers then employed by defendant Benny. The scripts of said January 27, 1952 and June 11, 1953 programs were prepared by the same writers, plus two additional writers on the June 11, 1953 script, all of whom were then employed by defendant CBS. Said scripts were written and performed in a manner which was highly original and unique and did not and will not detract in any way from the motion picture "Gaslight".

15. The use made by this answering defendant of the motion picture "Gaslight" was a fair use and not a copying of said motion picture in that said defendant used said motion picture only as the subject of an original and unique burlesque of said motion picture. [33]

Third Defense to First, Second and Third Counts:

16. Plaintiffs are not entitled to maintain this suit or to assert infringement as alleged in the complaint by reason of laches in that defendant Benny first used the motion picture entitled "Gaslight" on October 14, 1945, as the subject of a burlesque. Plaintiff cooperated with and assisted defendant

Benny in such radio production. Plaintiffs did not protest the use of the motion picture photoplay "Gaslight" as the subject of a burlesque for more than six years and, until the filing of this action, did not make any attempt to obtain a judicial determination of their alleged rights with respect to the burlesque by defendants of said motion picture; defendants have relied upon such acquiescence and delay and have continued to use burlesques of said motion picture and have invested large sums in reliance thereon; by reason thereof plaintiffs are estopped to assert that the burlesquing by this answering defendant of the motion picture "Gaslight" constitutes an infringement of plaintiffs' alleged copyrights.

Wherefore, said defendant prays that plaintiffs take nothing by their action and that said defendant may have his costs of suit.

Dated: November 19, 1953.

WRIGHT, WRIGHT, GREEN and
WRIGHT, LOYD WRIGHT,
CHARLES A. LORING,

/s/ By CHARLES A. LORING,
Attorneys for defendant Jack
Benny [34]

Affidavit of Service by Mail attached. [35]

[Endorsed]: Filed November 19, 1953.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS COLUMBIA BROADCASTING SYSTEM, INC., AND AMERICAN TOBACCO COMPANY

Defendants Columbia Broadcasting System, Inc., hereinafter referred to as defendant CBS, American Tobacco Company, and each of them, for answer to the complaint herein, admit, deny and allege as follows:

First Count

1. Deny each and every allegation contained in paragraph I of said count except as follows: Admit that the claims stated in the first and second counts of the complaint arise under the laws of the United States relating to and governing copyrights. [36]

2. Allege that these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs V, VI and VII of said count and each of them except as follows: Admit that prior to March 26, 1946, plaintiff Loew's produced a motion picture photoplay entitled "Gaslight."

3. Deny each and every allegation contained in paragraph VIII of said cause of action, except as follows: Admit and allege that on or about January 27, 1952, defendant American Tobacco Company sponsored, defendant CBS produced, and defendant Jack Benny performed in a play which was a burlesque of a motion picture photoplay entitled "Gaslight," and that said defendant CBS caused

said burlesque to be shown over the television facilities of said defendant either at the time of said production or shortly thereafter by means of a television recording; allege that on or about June 11, 1953, defendant American Tobacco Company sponsored, defendant CBS produced, and defendant Jack Benny performed in a motion picture photoplay which was caused to be filmed by defendant CBS, as permitted by the order of the above entitled court, for the purpose of showing said photoplay over the television facilities of said defendant CBS; that said motion picture photoplay was a burlesque of the motion picture photoplay entitled "Gaslight"; that defendant CBS will, unless restrained and enjoined by this court, broadcast said burlesque over its television network facilities; that the foregoing was done by defendants CBS, American Tobacco Company, and Jack Benny, and each of them, for the purposes, among others, of entertainment of the public and profit to themselves. [37]

4. Deny each and every allegation contained in paragraph IX of said cause of action.

Second Count

5. Answering paragraph I of said count, these answering defendants incorporate herein paragraphs 1, 2 and 3 above as if fully set forth.

6. Deny each and every allegation contained in paragraph II of said cause of action, except as follows: Admit and allege that on or about June 11, 1953, defendant American Tobacco Company spon-

sored, defendant CBS produced, and defendant Jack Benny performed in a motion picture photoplay which was a burlesque of the motion picture photoplay entitled "Gaslight." Allege that these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations that Loew's, Inc., is the copyright proprietor of said motion picture photoplay entitled "Gaslight." Admit and allege that defendant CBS plans and intends to display and exhibit said burlesque over its television network facilities for the purposes, among others, of entertainment of the public and profit to itself and that defendant CBS will proceed to do so unless restrained by the above entitled court.

7. Deny each and every allegation contained in paragraph III of said cause of action, except as follows: Admit and allege that on or about June 9, 1953, plaintiff Loew's, Inc., addressed a telegram to defendants Jack Benny, CBS and American Tobacco Company, which read as follows: [38]

"We are advised that a repeat performance or remake by you of the television version of 'Gaslight' heretofore performed on the Jack Benny Show January 27, 1952, over the C.B.S. Television Network is now being contemplated. Notice is hereby given you that we consider the prior performance and any subsequent performances or remakes thereof to constitute infringements of our rights in and to 'Gaslight,' and that we intend to enforce such rights by all proper remedies afforded by law."

Third Count

8. Answering paragraph I of said cause of action, these answering defendants incorporate herein paragraphs 1, 2, 3, 4, 6 and 7 above, and each of them, as if fully set forth.

9. Allege that these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III of said count.

10. Deny each and every allegation contained in paragraph IV of said count.

As and for their Affirmative Defenses herein, these Answering Defendants allege:

First Defense

11. Burlesque is a form of literary art which is as old as literature itself and its traditions are unbroken over the centuries. It has always been accepted and sanctioned as an [39] established mode of literary criticism.

Burlesque, as a form of literature, characteristically takes serious elements from the subject of the burlesque and puts them into absurd or nonsensical form, using the comic tricks of exaggeration, inversion, inflation, deflation and transposition. It frequently uses the story or parts of the story of the work which is the subject of the burlesque and incidents and characters from such work, all of which it puts into absurd or nonsensical form. The new form created by a burlesque has been recognized throughout the history of literature, as a form

of literary art distinct and different from the literary work which is the subject of the burlesque.

Burlesque is a form of freedom of expression which flourishes in those societies where there is the most democratic liberty. There have been very few important plays, novels, verses or stories that have not been burlesqued at least once during their lifetime. Through the long millennia of western civilization the stage has always laughed at itself using burlesque as the vehicle for such laughter.

12. Burlesquing of motion pictures has, for many years, been an accepted custom in the broadcasting of entertainment over the air. Numerous entertainers, including Jack Benny, Fred Allen, Sid Caesar, Imogene Coca, Jimmie Gleason, Bob Hope and Henry Morgan, have merrily spoofed various motion pictures by presenting, over the air, burlesques of such pictures. Since 1932, Jack Benny programs have presented twenty-six burlesques of motion pictures distributed by plaintiff Loew's, Inc. and fifty-eight [40] burlesques of motion pictures distributed by one or the other of the following distributors of motion pictures: Universal, R.K.O., United Artists, Twentieth Century-Fox, Warner Bros., Columbia and Paramount.

Said programs were comedy programs which appealed to listening and viewing audiences throughout the United States because of humorous situations, dialogue and antics presented by defendant Benny and his supporting cast. Said programs ordinarily extended for one-half hour of broadcasting

time including commercials, monologue, repartee, *signing* and the burlesque.

13. On or about October 14, 1945, a Jack Benny program, sponsored by defendant American Tobacco Company, was presented over the national radio network of the National Broadcasting Company which included a burlesque of the M-G-M motion picture "Gaslight." On or about January 27, 1952, a Jack Benny program, produced by defendant CBS and sponsored by defendant American Tobacco Company, was presented over the national television network of defendant CBS which included, with modifications, said burlesque of the M-G-M motion picture "Gaslight." On or about June 11, 1953, defendant American Tobacco Company sponsored and defendant CBS produced a Jack Benny program in the form of a motion picture which was filmed for the purpose of using it as one of a planned series of Jack Benny programs to be broadcast over the national television network of defendant CBS between September, 1953, and June, 1954. Said Jack Benny program included, with further modifications, said October 14, 1945, burlesque of the M-G-M motion picture "Gaslight."

The burlesques of "Gaslight" contained in all of said programs were the original creations of writers skilled in the literary art of burlesque. The script of said October 14, 1945, program was prepared by writers then employed by defendant Benny. The scripts of said January 27, 1952, and June 11, 1953, programs were prepared by the same writers,

plus two additional writers on the June 11, 1953, script, all of whom were then employed by defendant CBS. Said scripts were written and performed in a manner which was highly original and unique and did not and will not detract in any way from the motion picture "Gaslight."

14. The use made by these answering defendants of the motion picture "Gaslight" was a fair use and not a copying of said motion picture in that said defendants used said motion picture only as the subject of an original and unique burlesque of said motion picture.

Second Defense

15. Plaintiffs are not entitled to maintain this suit or to assert infringement as alleged in the complaint by reason of laches in that defendant Benny first used the motion picture entitled "Gaslight" on October 14, 1945, as the subject of a burlesque and plaintiff Loew's cooperated with Benny in such use of said motion picture. Plaintiffs did not protest the use of the motion picture photoplay "Gaslight" as the subject of a burlesque for more than six years and, until the filing of this action, did not make any attempt to obtain a judicial determination of their alleged rights with respect to the burlesque by defendants of said motion picture. Defendants have relied upon such acquiescence and delay and have continued to use burlesques of said motion [42] picture and have invested large sums in reliance thereon. By reason thereof, plaintiffs are

estopped to assert that the burlesquing by these answering defendants of the motion picture "Gaslight" constitutes an infringement of plaintiffs' alleged copyrights.

Third Defense

16. The play and motion picture photoplay complained of in said complaint were burlesques of, and amounted to no more than fair use and fair criticism of, said motion picture photoplay of Loew's. No one viewing either the said play or the said photoplay complained of could reasonably believe he was viewing said photoplay of Loew's, or any part thereof; and the public showing of the said play and the said photoplay complained of did not, and will not, satisfy in whole or in part any demand that may have existed, or that may now or hereafter exist, for said photoplay of of Loew's.

Wherefore, said defendants pray that plaintiffs take nothing by their action and that said defendants may have their costs of suit.

Dated November 18, 1953.

O'MELVENY & MYERS,
/s/ By HOMER I. MITCHELL,
/s/ By ERNEST M. CLARK, JR.,
Attorneys for Defendants Columbia Broadcasting System, Inc., and American Tobacco Company.

Affidavit of Service by Mail attached. [44]

[Endorsed]: Filed November 19, 1953.

[Title of District Court and Cause.]

PRELIMINARY INJUNCTION

The plaintiff having moved for a preliminary injunction and there being no appearance in opposition thereto and findings being waived:

It Is Hereby Ordered, Adjudged and Decreed that:

1. Pending the trial and determination on the merits of the within action, or until further order of this Court, defendants, their officers, agents, representatives, licensees, employees and servants, and each of them, shall be and they are hereby restrained and enjoined from performing, publicly or privately (except as hereinafter in paragraph 4 hereof set forth), distributing, releasing, exhibiting or displaying that certain motion picture photoplay entitled "Gas Light," which motion picture photoplay was copyrighted by plaintiff Loew's Incorporated and which is more particularly described in paragraphs VI and VII of the complaint on file herein, or any colorable copy, imitation or simulation thereof; and from using [45] the title "Gas Light" or any colorable copy, imitation or simulation thereof, or of any of them.

2. Specifically, and without limiting the generality of the foregoing paragraph 1, defendants, their officers, agents, representatives, licensees, employees and servants, and each of them, are restrained and enjoined from committing any of the acts hereinabove specified in paragraph 1, with re-

spect to those certain Jack Benny photoplays specified in paragraph VIII of the first count and paragraph II of the second count of the complaint on file herein, except for the limited purposes set forth in paragraph 4 hereof.

3. The negative film or films of that certain Jack Benny photoplay referred to in paragraph II of the second count of the complaint on file herein, which photoplay was filmed on June 11, 1953, and all developed film negatives of said Jack Benny photoplay and all prints thereof, including but not limited to "daily" cutting prints, composite release prints and "fine grain" prints, all of which have heretofore been made pursuant to order of this Court, shall remain in the safekeeping and custody of Consolidated Film Industries at its Hollywood, California film vaults, except during such periods as they may be withdrawn for the limited purposes set forth in paragraph 4 hereof. No prints, negatives or negative films other than those heretofore or hereafter authorized by this Court shall be made until further order of this Court.

4. The prints hereinabove referred to in paragraph 2 hereof, or any of them, may be removed by the parties from the film vaults of Consolidated Film Industries, for the following purposes and for no others:

(a) To exhibit said prints to the parties, the attorneys for the parties, and to such other persons as the attorneys for the parties may mutually agree, at such times and places as the attorneys for the

[46] parties may mutually agree, in connection with the preparation of this action for trial;

(b) To exhibit said prints to the Court in connection with the trial of this action.

Upon completion of any exhibition as hereinabove specified, said prints shall be returned forthwith to the film vaults of Consolidated Film Industries for custody and safekeeping pursuant to the provisions of paragraphs 3 hereof.

5. Security in the amount of $1,000.00 heretofore deposited by plaintiffs pursuant to Rule 65(c) of the Federal Rules of Civil Procedure is deemed proper by this Court, and said security shall be deemed to apply as well to this Preliminary Injunction, and no further security shall be required.

Dated and Issued: November 23, 1953 at 1:50 p.m.

/s/ JAMES M. CARTER,
District Judge.

The foregoing Preliminary Injunction is hereby approved as to form.

Dated: November ...., 1953.

LOEB & LOEB,
HERMAN F. SELVIN,
ALLEN E. SUSMAN,
/s/ By HARRY L. GERSHON,

/s/ By HARY L. GERSHON,
Attorneys for Plaintiffs

O'MELVENY & MYERS,
HOMER I. MITCHELL,
ERNEST M. CLARK, JR.,
/s/ By HOMER I. MITCHELL,
Attorneys for Defendant Columbia Broadcasting System, Inc., Columbia Broadcasting System, Inc., of California and American Tobacco Company. [47]

WRIGHT, WRIGHT, GREEN & WRIGHT,
CHARLES A. LORING,
RICHARD M. GOLDWATER,
/s/ By CHARLES A. LORING,
Attorneys for Defendant Jack Benny [48]

[Endorsed]: Filed November 23, 1953.

[Title of District Court and Cause.]

STIPULATION OF FACTS AND ORDER THEREON

The parties hereto, through their respective counsel of record, hereby stipulate and agree, for the purposes of this action and for no other purpose, that the following facts may be deemed to be true:

1. The claims stated in the first and second counts of plaintiffs' complaint arise under the laws of the United States relating to and governing copyrights.

The claims stated in the third count of plaintiffs'

complaint arise under the laws of the State of California. Plaintiff Loew's Incorporated is a citizen of [49] the State of Delaware. Plaintiff Patrick Hamilton is a citizen of Great Britain. Defendant Columbia Broadcasting System, Inc. (hereinafter referred to as "CBS") is a citizen of the State of New York. Defendant American Tobacco Company (hereinafter referred to as "American") is a citizen of the State of New Jersey. Defendant Jack Benny is a citizen of the State of California. The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.

2. Plaintiff Loew's Incorporated (hereinafter referred to as "Loew's") was at the commencement of this action and now is a Delaware corporation, qualified to transact and transacting business in the State of California and within the Southern District thereof. Loew's is and for more than twenty-five years has been continuously engaged in the production and world-wide distribution of motion picture photoplays under its trade-name "Metro-Goldwyn-Mayer Pictures." Said pictures are commonly known to and recognized by the motion picture viewing public as "Metro-Goldwyn-Mayer" pictures or "M-G-M" pictures, and Loew's is commonly known to and recognized by the motion picture viewing public as "Metro-Goldwyn-Mayer" studio or "M-G-M" studio. The names "Metro-Goldwyn-Mayer" and "M-G-M" have acquired throughout the world a secondary meaning as denoting plaintiff corporation as a producer and distributor of motion pictures, and as denoting the

motion pictures produced and distributed by plaintiff. [50]

3. Defendant Columbia Broadcasting System, Inc., is a New York corporation, qualified to transact and transacting business in the State of California and within the Southern District thereof. Said corporation is and at all times material herein has been engaged in the business of broadcasting and telecasting radio and television programs, throughout the United States, and distributing and licensing others to broadcast and telecast transcriptions and recordings of radio and television programs.

4. Defendant American Tobacco Company (hereinafter referred to as "American") is a New Jersey corporation, qualified to transact and transacting business in the State of California and within the Southern District thereof. American is engaged, among other things, in the manufacture, distribution and sale of "Lucky Strike" cigarettes.

5. Prior to December 5, 1938, plaintiff Patrick Hamilton (hereinafter referred to as "Hamilton") created and wrote an original play or dramatic composition entitled "Gas Light." At all times during the making, creation, and writing of said play or dramatic composition, Hamilton was and now is a British subject and a citizen and resident of Great Britain. Said play or dramatic composition was first performed in public at the Richmond Theatre in Richmond, England, and was subsequently performed at the West End and Apollo theatres in London, England. [51]

At all times material herein the copyright of literary and dramatic works in Great Britain and all of its dominions and protectorates was and now is governed by the British Copyright Act of 1911. "Publication," for the purposes of that Act is defined as "the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work * * * " Under the provisions of said Act all unpublished works are fully protected by copyright if the author of the work "was at the time of the making of the work a British subject * * * " Copyright protection under said Act is secured to the copyright proprietor and his assigns during the life of the author and for fifty years immediately after his death. Hamilton is still alive.

Said play or dramatic composition was first published in the English language and copies thereof were first issued to the public in London, England, on February 17, 1939, by Constable & Company, Ltd. A copy of said play as first published shall be received in evidence as Exhibit 1. Under the provisions of the Copyright Act of 1911, all published works are fully protected by copyright in Great Britain if "the work was first published within such parts of His Majesty's dominions to which the act extends * * * " Said play or dramatic composition, and all copies thereof, including but not limited to, copies sold in the United States, were published with notice of copyright as set forth in said Exhibit 1.

Thereafter, and on November 18, 1941, plaintiff

Hamilton deposited in the United States Copyright Office [52] one complete copy of the edition published in England as aforesaid. The following is a copy of a Certificate of Copyright Registration issued by the Register of Copyrights with respect to said deposit:

"Additional Certificate (17 U.S.C. 215) Class D For. No. 78298.

Copyright Office of the United States of America.

The Library of Congress: Washington.

Certificate of Copyright Registration

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that of the Dramatic Composition named herein, by a citizen or subject of a foreign state or nation, One complete copy of the best edition, published in a foreign country, has been deposited in this Office under the provisions of the Act of 1909, as amended by the Act approved March 28, 1914, and that registration of a claim to copyright for the first term of twenty-eight years for said work has been duly made in the name of Patrick Hamilton, 21 Marlborough Rd., London N.W. 8, England. [53]

Title: Gas Light.

A Victorian thriller in three acts, by Patrick Hamilton, of Great Britain.

Date of publication Feb. 17, 1939. Copy received Nov. 18, 1941.

Published by Constable and Company Ltd. at London.

(Seal) ARTHUR FISHER,
Register of Copyrights".

On September 29, 1942, the play "Gas Light" was republished in the United States by Samuel French under the title "Angel Street" with the following notice of copyright:

"Copyright 1939, by Patrick Hamilton under the title, 'Gas Light.' Copyright 1942 (Acting Edition), by Patrick Hamilton."

Hamilton, in connection with said republication under the title "Angel Street," received from the Register of Copyrights a Certificate of Registration dated and certified as follows: "September 29, 1942, Class D, No. 82036."

The play was produced by Shepard Traube in association with Alexander H. Cohen, opening at the John Golden Theatre in New York on December 5, 1941. The play under the title "Angel Street," was thereafter licensed and performed in legitimate theatres, stock companies and community playhouses throughout the United States and Great Britain. [54].

By an agreement in writing dated October 7, 1942, Hamilton and his assignees sold, transferred and assigned to Loew's, among other things, all motion picture rights, in all languages, throughout the

world, without limit of time, in said play or dramatic composition entitled "Gas Light," including but not limited to silent, sound, talking and musical motion picture rights, and the right to televise and/or broadcast the motion pictures thus produced, as well as the right to remake said motion picture and to produce, distribute, exploit and publicize such remakes and/or any motion pictures based upon said play or dramatic composition or adapted therefrom.

6. Commencing December 1, 1942, and through May 5, 1944, Loew's created and produced an original motion picture photoplay entitled "Gaslight," featuring Charles Boyer, Ingrid Bergman and Joseph Cotten in the leading roles, based upon and adapted from said play or dramatic composition.

The purchase price paid by Loew's for the rights granted it in said play or dramatic composition, as set forth in paragraph 5 hereof, was $150,000. Commencing December 1, 1942, Loew's assigned certain screenwriters to the production of a screenplay for said motion picture photoplay, based upon said play or dramatic composition. Said screenwriters were employed by Loew's for that purpose and rendered their services in that connection for hire. Said screenwriters were: John Balderston, John van Druten, Estelle Newburgh and [55] Walter Reisch. Said writers worked a total of 77 weeks and 5 days in the production of said screenplay. The total cost to Loew's of the writing of said screenplay by the aforementioned writers was $126,691.98.

7. Said motion picture photoplay entitled "Gas-

light" was first published, with proper notice of copyright duly affixed in the name of Loew's, on May 5, 1944. Thereafter, with respect to said motion picture photoplay, Loew's received from the Registrar of Copyrights a Certificate of registration dated and certified as follows: "March 26, 1946, Class L, No. 170."

8. A true and correct copy of said motion picture photoplay entitled "Gaslight" shall be received in evidence as Exhibit 2 and will be exhibited to the above-entitled Court in connection with the trial of this action. The exhibition of said motion picture consumed approximately 1 hour and 40 minutes.

A true and correct copy of the dialogue cutting continuity script of said motion picture photoplay shall be received in evidence as Exhibit 3.

9. Since May 5, 1944, said motion picture photoplay has been exhibited by Loew's and by persons, firms and corporations licensed by it to exhibit said motion picture photoplay, in the following named countries and territories: [56]

Argentine, Australia, Belgium, Brazil, British West Indies, Canada, Chile, China, Colombia, Cuba.

Denmark, Ecuador, Egypt, Finland, Formosa, France, French Indo-China, Germany, Great Britain, Greece, Holland, Hong Kong, India, Italy.

Japan, Mexico, Netherlands East Indies, New Zealand, Norway, Palestine, Panama, Peru, Philippines, Portugal, Puerto Rico.

Siam, South Africa, Spain, Straits Settlements, Sweden, Switzerland, Syria.

United States, Uruguay, Venezuela, British West

Africa, Bermuda, Iceland, Turkey, Iran, Haiti.

Bahrein, Korea, Poland, Yugoslavia, Hungary, Czechoslovakia, Roumania, U.S. Army Installations here and abroad.

U.S. Navy ships afloat, and U.S. Naval Bases here and abroad.

Said motion picture photoplay was at all times distributed, exhibited, announced, advertised and exploited, and was at all times known to the motion picture [57] viewing public, as a "Metro-Goldwyn-Mayer" picture or "M-G-M" picture.

10. The total cost of production and distribution of said motion picture photoplay, the total gross rentals received by Loew's from the world-wide distribution and exhibition thereof, and the estimated total number of persons who paid admission fees or prices to see said motion picture photoplay, all through August 31, 1952, were as follows:

Total Production and Distribution Cost	$2,458,275.18
Total Gross Rentals:	
Domestic (U.S.A. and Canada)	$2,268,948.10
Foreign (all other countries)	2,588,111.82
Total	$4,857,059.92
Approximate Total Number of Paid Admissions:	
Domestic	24,786,000
Foreign	27,000,000
Total	51,786,000

11. The cost, receipt and attendance figures enumerated in paragraph 10, supra, are for the period of initial release and distribution of said motion picture photoplay. Said motion picture photoplay was withdrawn from domestic release and distribution on November 30, 1946, and has not yet been reissued. Said motion picture photoplay is still in distribution in the foreign market. [58]

It is a customary and usual practice in the motion picture industry to reissue for distribution and exhibition, five or more years after their initial release, motion pictures which have been highly successful in their initial release. Substantial rentals are often received from reissues of successful motion pictures.

12. At all times material hereto defendant Jack Benny (hereinafter referred to as "Benny") was and now is a radio and television comedian and entertainer and the leading performer on the radio and television programs commonly referred to as "Jack Benny Programs." Since on or about July 1, 1944, said programs have been sponsored by American and upon which programs "Lucky Strike" cigarettes are advertised. Prior to said date, the Jack Benny Programs were sponsored on the radio for various periods of time by various corporations advertising Canada Dry Ginger Ale, Chevrolet, General Tires, and Jello. Prior to January 2, 1949, said programs were broadcast over the network of National Broadcasting Company. Such programs are comedy programs which appeal to the listening and viewing audience because of the hum-

orous situations, dialogue and antics presented by Benny and his supporting cast. Each such program ordinarily extends for one-half hour broadcasting or television time. Benny is recognized as one of the most highly expert performers in many fields of comedy.

13. It has been Benny's custom to present from time to time on the Jack Benny programs over radio [59] and, on two occasions, on television, programs which include a play which Benny has usually described as "our version" of a specified motion picture. Benny has, since 1932, presented over radio plays on the following dates, which plays were usually described by him as "our version" of the following motion pictures produced and distributed by Loew's:

Name of Picture and Date of Broadcast

Grand Hotel: Oct. 10, 1932, Oct. 17, 1932, Dec. 1, 1932, Jan. 14, 1934, Nov. 25, 1934.

Strange Interlude: Dec. 18, 1932.

Dinner at Eight: Oct. 22, 1933, Jan. 21, 1934.

Romeo and Juliet: Nov. 12, 1933, Oct. 25, 1936, Nov. 1, 1936.

Barrett's of Wimpole Street: 1934.

Mutiny on the Bounty: Jan. 5, 1936.

Ah Wilderness: April 12, 1936, May 16, 1937.

Yellow Jack: Oct. 9, 1938.

Yank at Oxford: April 10, 1938.

Northwest Passage: May 19, 1940.

Gas Light: Oct. 14, 1945.

Week-End at the Waldorf: April 7, 1946.

Edward My Son: Sept. 18, 1949. [60]

King Solomon's Mines: Jan. 7, 1951, Jan. 14, 1951.
Dr. Jekyl and Mr. Hyde: Jan. 27, 1952.

Prior to April 5, 1938, Benny requested of Loew's that it permit him to broadcast "a so-called burlesque" of its photoplay "A Yank at Oxford." By written agreement between Loew's and Benny dated April 5, 1938, it was agreed that Loew's would give its permission therefor, upon condition that Benny submit the script thereof to Loew's for approval prior to broadcast and that, if Loew's did not give written approval thereof, the "burlesque" would not be broadcast.

Prior to April 6, 1946, Benny requested permission of Loew's for the appearance of Van Johnson, then under contract to Loew's, on his program of April 7, 1946, on which Benny presented a play described by him as "our version" of the Loew's photoplay "Week-End at the Waldorf." On April 6, 1946, by written agreement between Loew's and Benny, Loew's gave its permission for Van Johnson's appearance on Benny's program, upon condition that all material used in such program would be submitted to Loew's for advance approval and that, unless such material were first approved by Loew's in writing, Van Johnson would not be permitted to appear. Such material was in fact submitted and approved.

Prior to January 3, 1951, Benny informed Loew's that he desired to do a radio "version" of its photoplay "King Solomon's Mines" and requested that Loew's [61] loan him certain sound tracks from the photoplay for use in connection with his broadcast.

On January 3, 1951, Loew's furnished to Benny the requested sound tracks. Deborah Kerr, then under contract to Loew's, appeared on the Benny radio programs of January 7, 1951, and January 14, 1951, for the purpose of acting in the Benny "version" of "King Solomon's Mines," with the prior consent of Loew's.

Benny has presented over television plays on the following dates, which plays were described by him as "our version" of the following photoplays produced and distributed by Loew's:

Name of Picture and Date of Broadcast: Gaslight, January 22, 1952; Dr. Jekyl and Mr. Hyde, March 22, 1953.

Of the aforementioned motion pictures, the basic literary material of the following motion pictures was at the time of broadcast in the public domain: Romeo and Juliet, King Solomon's Mines, Dr. Jekyl and Mr. Hyde.

With respect to motion pictures produced or distributed by motion picture companies other than Loew's, Benny has, since 1932, presented over radio plays usually described by him as "our version" of such motion pictures, on the following dates: [62]

Name of picture, Distributor and Date of broadcast

All Quiet on the Western Front: Universal, May 19, 1933.

Little Women: R.K.O., Feb. 11, 1934.

House of Rothschild: United Artists, Aug. 24, 1934.

Rain: United Artists, 1934.

Flying Down to Rio: R.K.O., May 19, 1935.

Name of picture, Distributor and Date of broadcast

Les Miserables: July 7, 1935.

What Price Glory: 20th Century-Fox, Oct. 20, 1935.

Charlie Chan: 20th Century-Fox, Dec. 1, 1935.

Emperor Jones: United Artists, 1935.

Anthony Adverse: Warner Bros., Oct. 11, 1936, Oct. 18, 1936.

Lost Horizon: Columbia.

Submarine D-1: Warner Bros. Feb. 20, 1938, Feb. 27, 1938.

Tobacco Road: 20th Century-Fox, March 31, 1941.

Charlie's Aunt: 20th Century-Fox, May 19, 1941.

Algiers: United Artists, Oct. 23, 1938.

Snow White: R.K.O., April 24, 1938.

Tom Sawyer: Paramount, May 22, 1938, May 29, 1938, June 5, 1938.

Jesse James: 20th Century-Fox, Feb. 26, 1939, March 5, 1939.

Gunga Din: R.K.O., May 14, 1939, May 21, 1939.

Alexander Graham Bell: May 28, 1939.

Hound of the Baskervilles: 20th Century-Fox, June 4, 1939, June 11, 1939. [63]

Mr. Smith Goes to Washington: Columbia, March 10, 1940.

Hunchback of Notre Dame: R.K.O., March 17, 1940.

Pinocchio: R.K.O., March 31, 1940.

Casablanca: Warner Bros., Oct. 17, 1943.

Algiers: United Artists, Oct. 24, 1943.

State Fair: 20th Century-Fox, Jan. 13, 1946, Jan. 20, 1946.

Name of picture, Distributor, and Date of broadcast

Lost Week-End: Paramount, March 10, 1946.

The Killers: Universal, Nov. 24, 1946, Nov. 12, 1950.

Margie: 20th Century-Fox, Jan. 26, 1947.

Dark Passage: Warner Bros., Nov. 2, 1947.

Nightmare Alley: 20th Century-Fox, Feb. 8, 1948.

The Egg and I: Universal, May 23, 1948.

Sorry, Wrong Number: Paramount, Oct. 17, 1948.

Treasure of Sierra Madre: Warner Bros., May 1, 1949.

The Champion: United Artists, May 22, 1949, March 19, 1950.

Sunset Boulevard: Paramount, March 25, 1951.

Bend of the River: Universal, April 27, 1952.

Capt. Horatio Hornblower: Warner Bros., September 23, 1951.

Saturday's Hero: Nov. 18, 1951.

High Noon: United Artists, Sept. 28, 1952, Feb. 1, 1953. [64]

Road to Bali: Paramount, Jan. 11, 1953.

Snows of Kilimanjaro: 20th Century-Fox, March 8, 1953.

Mississippi Gambler: Universal, March 29, 1953.

Return to Paradise: United Artists, Sept. 20, 1953.

Wings of the Hawk: Universal, Oct. 18, 1953.

All American: Universal, Nov. 8, 1953.

With respect to motion pictures produced and distributed by Paramount, Benny's broadcasts of his "versions" of "Road to Bali" and "Lost Week-

End" were first suggested to him by the Paramount Publicity Department, and Bob Hope and Ray Milland, both then under contract to Paramount, appeared as guests on the programs, Hope on "Road to Bali" and Milland on "Lost Week-End."

Of the aforementioned motion pictures, the basic literary material of the following motion pictures was at the time of broadcast in the public domain: Little Women, Les Miserables, Charlie's Aunt, Snow White, Tom Sawyer, Gunga Din, Hound of the Baskervilles, Hunchback of Notre Dame, Pinocchio.

Exhibits 4a, 4b, 4c and 4d are typical examples of such plays presented on Jack Benny Programs and Exhibits 5a, 5b, 5c and 5d are the dialogue cutting continuity scripts of the motion pictures involved. Said exhibits may be offered in evidence subject to such objections as plaintiffs may make as to their relevance or materiality.

14. Since January 2, 1949, the Jack Benny Programs have been produced by CBS and have been broadcast and telecast throughout the United States over the radio stations and television channels owned and operated by or affiliated with CBS. CBS is a nationally known radio and television system or network.

15. On or about October 14, 1945, Benny caused to be written and produced a Jack Benny half-hour radio program, which included as a part thereof a playlet, of approximately 15 minutes in length, featuring Benny and Miss Ingrid Bergman in the leading roles. Miss Bergman played the leading role in the M-G-M motion picture "Gaslight." Loew's

did not have prior notice of nor did it consent to Miss Bergman's furnishing to Benny's writers her copy of the shooting script of the motion picture "Gaslight," as set forth in Paragraph 27, infra. Said radio program, including said playlet, was publicly performed at the U.S. Army Redistribution Center at Santa Barbara, California, on October 14, 1945, and said performance was broadcast on the radio on said date over the stations of the National Broadcasting Company being sponsored by American. Said radio program was transcribed on a phonograph record.

16. A true and correct record transcription of said radio program of October 14, 1945, shall be received in [66] evidence herein as Exhibit 6 and will be played for the above-entitled Court in connection with the trial of this action.

A true and correct copy of the script of said radio program of October 14, 1945, shall be received in evidence as Exhibit 7.

17. It is stipulated that, if called as a witness, Benny would testify as follows: That prior to said broadcast he advised Mr. Louis B. Mayer, then vice-president of Loew's Incorporated, that he intended to do what he then termed a "burlesque" of M-G-M's motion picture "Gas Light" and requested that Loew's send a print of the motion picture to the Redistribution Center so that it could be exhibited there during the week preceding the broadcast and thus enable the members of the Armed Forces at the Center, who would be his "studio audience," to be familiar with the motion

picture "Gas Light" so as better to enjoy and appreciate his "burlesque" thereof. In accordance with Benny's request, Loew's furnished a print of said motion picture to said Center.

18. On or about January 27, 1952, CBS caused to be written and produced a Jack Benny half-hour television program, presenting a play featuring Benny and Miss Barbara Stanwyck, a highly successful motion picture and theatre actress, in the leading roles. Said television program was publicly performed on television by CBS on January 27, 1952, being sponsored by American and being televised [67] over the channels and national television network of CBS as aforesaid. Said television program was reproduced on motion picture film and shortly after the broadcast of the television program on January 27, 1952, the motion picture film of said program was broadcast over those television stations affiliated with CBS which were unable to broadcast the live television program.

Benny received compensation from CBS for his services in connection with said program, and CBS received compensation from American for the production of said program and for the rental of the television time upon which said program was performed upon its channels and network.

19. A true and correct copy of said television program of January 27, 1952, reproduced on motion picture film, shall be received in evidence as Exhibit 8 and will be exhibited to the above-entitled Court in connection with the trial of this action. Said television program consumed 30 minutes, and

said play as a part of said program consumed approximately 15 minutes. A true and correct copy of the script of said television program of January 27, 1952, shall be received in evidence as Exhibit 9.

20. On January 30, 1952, Loew's addressed a letter to CBS reading as follows: [68]

"Columbia Broadcasting System
6121 Sunset Boulevard
Hollywood, California

Gentlemen:

This is to confirm the wire which we sent out to you today reading:

We Understand That on the Jack Benny Television Program of Sunday January 27, 1952, Substantial Portions of the Play 'Gaslight' by Patrick Hamilton Were Used. In All Fairness to You and in Order to Avoid Any Possible Future Unpleasantness We Would Like at This Time to Draw Your Attention to the Fact That by Various Mesne Agreements We Have Acquired From the Author Patrick Hamilton and Now Own Sole and Exclusive Rights to Produce and Record Said Play and Adaptations Thereof by Means of Cinematograph and Talking Films Sound Track Records Electrical and Mechanical Contrivances Broadcasting Television and Any Other Instruments Methods Devices and Means Whatsoever Now or Hereafter Known or Used for the Visual and/or Acoustic Production of the Same. Needless to Tell You That We Intend to and Shall Enforce Our Rights if They Be In-

fringed. We Would Appreciate Your Acknowledging Receipt of This Notice.

Very truly yours,

R. Monta, For Loew's Incorporated

RM:JM

Registered Mail No. 23246

Return Receipt Requested" [69]

The wire therein referred to was also sent. R. Monta was and is an employee of Loew's in charge of problems relating to literary, dramatic and musical properties.

On February 12, 1952, CBS addressed a letter to Loew's reading as follows:

"Loew's Incorporated
Culver City, California
Attention: Mr. R. Monta

Gentlemen:

This is to acknowledge receipt of your letter of January 30, 1952, confirming a wire sent to us by you with respect to use of the play 'Gaslight' upon the Jack Benny television program of Sunday, January 27, 1952.

Since it is our opinion that any reference to the play 'Gaslight' was well within the doctrine of 'fair use' which includes, as you know, the right to parody literary properties, we cannot agree with

any implication that such use infringed any rights of Patrick Hamilton or his assignees.

Very truly yours,

Richard W. Jencks
Assistant Resident Attorney

RWJ/hd"

Richard W. Jencks was then Assistant Resident Attorney and is now Resident Attorney of CBS at Los Angeles, [70] California.

Subsequent to the exchange of correspondence hereinabove set forth, Allen E. Susman, attorney for Loew's, and Gordon Hall, attorney for CBS, conferred with respect to the television program of January 27, 1952. Mr. Susman stated that it was Loew's position that said program constituted copyright infringement. Mr. Hall denied this, stating that same was authorized as "fair use." No resolution of these conflicting views was then had or attempted.

21. On or about May 28, 1953, CBS commenced the preparation of a motion picture, the script for which had theretofore been prepared, featuring Jack Benny and Miss Barbara Stanwyck. It was the intention of CBS to broadcast said motion picture over the television channels and network of CBS as one of five filmed Jack Benny television programs to be exhibited on television during the year commencing September 13, 1953.

22. On June 9, 1953, Loew's was for the first time informed that defendants intended to film said

motion picture as one of five filmed television shows to be exhibited on television during the year commencing September 13, 1953, as part of the "Jack Benny Television Program," to be presented and sponsored by American and to be exhibited over the television channels and network of CBS, and upon which Lucky Strike cigarettes were to be advertised. [71]

23. Under date of June 9, 1953, Loew's notified Benny, American and CBS as follows:

"We are advised that a repeat performance or remake by you of the television version of 'Gaslight' heretofore performed on the Jack Benny show of January 27, 1952, over the CBS television network is now being contemplated. Notice is hereby given you that we consider the prior performance and any subsequent performances or remakes thereof to constitute infringements of our rights in and to 'Gaslight,' and that we intend to enforce such rights by all proper remedies afforded by law."

24. On June 10, 1953, plaintiffs filed the above-entitled action and on the same date the above-entitled Court issued its temporary restraining order. On June 11, 1953, the above-entitled Court modified said temporary restraining order to permit the photographing upon motion picture film of said proposed television performance and said proposed television performance was in fact photographed on motion picture film subject to the order of the above-entitled Court dated June 11, 1953.

25. A true and correct copy of the motion picture film of said proposed television performance

shall be received in evidence herein as Exhibit 10 and will be exhibited to the above-entitled Court in connection with the trial of this action. The time consumed by said proposed television program is 30 minutes, and the time [72] consumed by said play as a part of said program is approximately 15 minutes.

A true and correct copy of the script of said television program of January 27, 1952, shall be received in evidence as Exhibit 11.

26. Defendants intend to and will, unless restrained therefrom by order of this Court, exhibit and cause to be exhibited said television program photographed on motion picture film on June 11, 1953, throughout the United States and over all of the television channels and network of CBS. Said exhibition will be conducted as in paragraph 22 specified.

27. The scripts of said Jack Benny radio programs marked Exhibits 7, 9 and 11 were written by Sam Perrin, George Balzer, John Tackaberry and Milton Josephsberg except that with respect to Exhibit 9 Alvin Gordon and Harold Goldman also rendered services in the writing of the script of said program. Prior to the preparation of Exhibit 7 in 1945, said Sam Perrin, George Balzer, John Tackaberry and Milton Josephsberg and Jack Benny viewed the motion picture "Gaslight," and prior thereto Sam Perrin and Milton Josephsberg saw the stage play "Angel Street." At the time of the preparation of said script said Sam Perrin, George Balzer, John Tackaberry and Milton Jo-

sephsberg had obtained and had available to them for reference a copy of the stage play "Angel Street" and had borrowed from Ingrid Bergmnn and had [73] available to them a copy of the shooting script of the motion picture "Gaslight." Thereafter, said writers did not see the motion picture "Gaslight" nor the stage play "Angel Street," nor the shooting script of the motion picture "Gaslight" but they continued to have available to them a copy of the stage play "Angel Street."

For their services in preparing Exhibit 7 (the 1945 script), said Sam Perrin, George Balzer, John Tackaberry and Milton Josephsberg were paid the sum of $3,000.

For their services in preparing Exhibit 9 (the 1952 script), said Sam Perrin, George Balzer, John Tackaberry, Milton Josephsberg, Alvin Gordon and Harold Goldman were paid $5,716.66. Perrin, Balzer, Tackaberry and Josephsberg were paid on a per job basis; Gordon and Goldman were paid a weekly salary.

With respect to the services of said Sam Perrin, George Balzer, John Tackaberry and Milton Josephsberg in the preparation of Exhibit 11 (the 1953 script), said writers were on weekly salaries in return for which they were obligated to produce thirty-nine radio programs and thirteen television programs. Of said salaries CBS charged against the preparation of Exhibit 11 the sum of $5,000.

Prior to June 10, 1953, CBS had paid or obligated itself to pay the sum of $54,167, which con-

stituted the [74] cost of production of Exhibits 10 and 11.

The parties hereto do not waive and hereby specifically reserve until the time of trial herein any and all objections which they may have to the relevance or materiality of any of the facts or testimony contained in this stipulation, as well as the right to introduce any additional evidence upon any of the issues herein.

Dated: December 31, 1953.

LOEB AND LOEB,
HERMAN F. SELVIN,
ALLEN E. SUSMAN,
HARRY L. GERSHON,
/s/ By HARRY L. GERSHON,
Attorneys for Plaintiffs.

O'MELVENY & MYERS,
HOMER I. MITCHELL,
ERNEST M. CLARK, JR.,
/s/ By HOMER I. MITCHELL,
Attorneys for Columbia Broadcasting System, Inc., Columbia Broadcasting System, Inc. of California and American Tobacco Company.

WRIGHT, WRIGHT, GREEN & WRIGHT,
CHARLES A. LORING,
RICHARD M. GOLDWATER,
/s/ By CHARLES A. LORING,
Attorneys for Defendant Jack Benny

Upon the foregoing stipulation, It Is So Ordered this 5th day of January 1954.

/s/ JAMES M. CARTER,
Judge [75]

[Endorsed]: Filed January 5, 1954.

[Title of District Court and Cause.]

STIPULATION AS TO THE APPROXIMATE SIZE OF THE AUDIENCE FOR JACK BENNY TELEVISION PROGRAMS

It Is Hereby Stipulated by and between plaintiffs and defendants that, based upon a survey made by Nielsen National Television Index of the number of homes reached by the Jack Benny television programs for the current season, and based upon a survey made by the AMN Research Bureau showing that the average number of viewers for television broadcasts generally is 3.1 viewers per set, the Jack Benny television programs on the dates hereinafter specified reached approximately the number of homes hereinafter specified and were viewed by approximately the number of viewers hereinafter specified: [76]

Broadcast date: September 13, 1953; homes reached: 8,199,000; viewers reached: 25,417,000.

Broadcast date: October 4, 1953; homes reached: 6,073,000; viewers reached: 18,826,000.

Broadcast: October 25, 1953; homes reached: 7,863,000; viewers reached: 24,375,000.

Broadcast date: November 15, 1953; homes reached: 8,882,000; viewers reached: 27,534,000.

Broadcast date: December 6, 1953; homes reached: 8,419,000; viewers reached: 26,099,000.

Dated: January 20, 1954.

LOEB & LOEB,
/s/ By ROGER H. DAVIS,
Attorneys for Plaintiffs

WRIGHT, WRIGHT, GREEN & WRIGHT,
/s/ By RICHARD M. GOLDWATER,
Attorneys for Defendant Jack Benny

O'MELVENY & MYERS,
/s/ By HOMER I. MITCHELL,
Attorneys for Defendant Columbia Broadcasting System, Inc. and American Tobacco Company.

It Is So Ordered this 21st day of January, 1954.

/s/ JAMES M. CARTER,
Judge [77]

[Exhibit No. 15, admitted in evidence 1/21/54.]

[Endorsed]: Filed January 21, 1954.

[Title of District Court and Cause.]

STIPULATION RE INTRODUCTION INTO EVIDENCE OF DRAMA "ARIZONA" AND BURLESQUE THEREOF

Whereas, at the trial of the herein action Dr. Frank C. Baxter testified as follows: "In the history of the New York stage we see burlesques given in the first part of this century of Arizona, Barbara Frietchie, Bohemian Girl, Camille." (Reporter's Transcript page 50); and

Whereas, counsel for defendants have only recently discovered that there is on file in the New York Public Library copies of several burlesques presented on the New York stage in the first part of this century, among such being the burlesque of "Arizona" referred to by Dr. Frank C. Baxter;

Now, Therefore, it is hereby stipulated by the parties hereto by and through their respective attorneys as follows:

1. The trial of the herein action may be and hereby is reopened for the purpose of introducing the following evidence [78] which may be and hereby is admitted into evidence as a part of defendants' case, subject to the objections heretofore made by plaintiffs to Dr. Baxter's testimony herein and to the introduction in evidence of Exhibits 4A through D, 5A through D, 12 and 13, and paragraph 13 of the Stipulation of Facts, which objections shall be deemed to have been made to the introduction in evidence of the exhibits hereinafter referred to:

A. A copy of the book "Arizona", a drama in

four acts written by Augustus Thomas, which will be marked Exhibit 16.

B. A copy of a burlesque written by Edgar Smith of said "Arizona", which will be marked Exhibit 17.

2. Said drama "Arizona" was first presented in New York on September 10, 1900, in the Herald Square Theatre at Broadway and 35th Street. It played for a total of 140 performances.

3. Said burlesque of "Arizona" was first presented in New York on October 18, 1900, in the Weber and Fields Broadway Music Hall between Broadway and Sixth Avenue.

O'MELVENY & MYERS,
/s/ HOMER I. MITCHELL,
Attorneys for Columbia Broadcasting System, Inc., and American Tobacco Company

WRIGHT, WRIGHT, GREEN & WRIGHT,
/s/ By CHARLES A. LORING,
Attorneys for Jack Benny

LOEB & LOEB,
/s/ By HARRY L. GERSHON,
Attorneys for Plaintiffs

It Is So Ordered this 16th day of February, 1954, and cause re-submitted this date.

/s/ JAMES M. CARTER,
Judge [79]

[Endorsed]: Filed February 16, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly to be heard on January 5, 1954, before the Honorable James M. Carter, District Judge, sitting without a jury, a jury having been expressly waived by the parties. Plaintiffs appeared by their attorneys Messrs. Loeb and Loeb, by Herman F. Selvin, Allen E. Susman and Harry L. Gershon; defendants Columbia Broadcasting System, Inc., Columbia Broadcasting System, Inc., of California, and American Tobacco Company, appeared by their attorneys Messrs. O'Melveny & Myers, by Homer I. Mitchell, W. B. Carman, and Ernest M. Clark, Jr.; and defendant Jack Benny by his attorneys, [80] Messrs. Wright, Wright, Green & Wright by Richard M. Goldwater. The cause was dismissed as to defendant Columbia Broadcasting System, Inc. of California and all fictitiously named defendants. Evidence both oral and documentary was received in behalf of the respective parties, and the cause having been duly argued and submitted to the Court for decision, and the Court having duly considered the same, now makes its Findings of Fact and Conclusions of Law herein as follows:

Findings of Fact

I.

This cause, as to the claims stated in the first and second counts of the complaint herein, arises under the Copyright Laws of the United States and is,

therefore, a case of which this Court has jurisdiction under and by virtue of the provisions of Title 28, section 1338(a) of the United States Code. With respect to the claim stated in the third count of the complaint the cause is one in which such claim has been joined with a substantial and related claim under the copyright laws, and is also one wholly between citizens of different states in which the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00; and is, therefore, a case of which this Court has jurisdiction under and by virtue of the provisions of Title 28, sections 1338(b) and 1332 of the United States Code.

II.

At all times material herein: plaintiff Loew's Incorporated (hereinafter for convenience referred to as "Loew's") has been and is now a corporation duly organized and existing under and by virtue of the laws of, and so was and is a citizen of, the state of Delaware, duly qualified to transact and transacting business in the state of California and within the Southern Federal Judicial District of California; [81] plaintiff Patrick Hamilton (hereinafter for convenience referred to as "Hamilton") has been and is now a citizen and resident of Great Britain; defendant Columbia Broadcasting System, Inc. (hereinafter for convenience referred to as "CBS") has been and is a corporation duly organized and existing under and by virtue of the laws of, and so was and is a citizen of, the state of New York, duly qualified to transact and transacting

business in the state of California and within said Southern District of California; defendant Columbia Broadcasting System, Inc. of California has been and is a corporation duly organized and existing under and by virtue of the laws of, and so was and is a citizen of, the state of California, transacting business within said Southern District of California; defendant American Tobacco Company (hereinafter for convenience referred to as "American") has been and is a corporation duly organized and existing under and by virtue of, and so was and is a citizen of, the state of New Jersey, qualified to transact and transacting business in the state of California and within said Southern District of California; defendant Jack Benny (hereinafter for convenience referred to as "Benny") was and is a citizen of the state of California.

III.

Prior to December 5, 1938 Hamilton created and wrote in Great Britain an original play or dramatic composition entitled "Gas Light." Copyright of said play or dramatic composition was duly and regularly secured by Hamilton in Great Britain under and pursuant to the laws of that country. Thereafter, on November 18, 1941, Hamilton complied in all respects with the copyright laws of the United States and all other laws thereof governing copyright and secured the exclusive rights and privileges in and to said play or dramatic composition in the United States and received from the

Register of Copyrights a certificate of copyright therein and thereto. [82]

IV.

On or about October 7, 1942, Hamilton and his assignees sold, transferred and assigned to Loew's all motion picture rights, in all languages throughout the world and without limitation of time, in said play or dramatic composition "Gas Light," and Loew's ever since has been and is now the owner of said rights.

V.

Subsequent to October 7, 1942, and prior to May 5, 1944, Loew's created and produced an original motion picture photoplay entitled "Gas Light," based upon and adapted from said play or dramatic composition. Beginning on May 5, 1944, said motion picture photoplay has been exhibited by Loew's, and by persons, firms and corporations licensed by it to exhibit said motion picture photoplay, throughout the United States and in many parts of the world. Said motion picture photoplay is still in distribution in the foreign market.

VI.

On or about May 5, 1944, Loew's complied in all respects with the copyright laws of the United States and all other laws thereof governing copyright and secured the exclusive rights and privileges in and to said motion picture photoplay, and received from the Register of Copyrights a certifi-

cate of registration therein and thereto. At all times since Loew's has been and is now the proprietor of all rights, title and interest in and to said motion picture photoplay and the copyright thereof.

VII.

On or about October 14, 1945, Benny caused to be written and produced, by writers and other persons in his employ and under his direction and control, a radio play. Said play featured Benny in one of the principal roles and was based upon and adapted and copied in substantial part from the motion picture photoplay hereinabove [83] in Findings V and VI referred to. Said play was publicly performed over radio as part of one half-hour program starring Benny and sponsored by and advertising the products of American. Said performance was done with the permission of Loew's but said permission did not extend beyond that specific performance.

VIII.

On or about January 27, 1952, CBS caused to be written and produced, by writers and other persons in its employ and under its direction and control (some of which writers were the same writers hereinabove in Finding VII referred to) and with the knowledge and consent of Benny, a television program starring Benny and sponsored by and advertising the products of American. Included in said television program was a play entitled "Gas Light" which was copied by said writers and producers, in substantial part from the motion picture photoplay

hereinabove in Findings V and VI referred to, without the knowledge, consent, permission or license of plaintiffs, or either of them. The part so copied was and is a substantial part of said play and of the copyrightable and copyrighted material in said motion picture photoplay. Said television program, including said play, was publicly performed and exhibited on television for profit by CBS over its channels and national network throughout the United States. Said program was *conspored* by and advertised the products of American. Said program, including said play, was reproduced on motion picture film and by means thereof was, subsequent to January 27, 1952, publicly performed and exhibited on television for profit by various television stations throughout the United States affiliated with CBS which were unable to televise or broadcast it at the time of its first public performance or exhibition. Said motion picture film is still in existence and in the possession and under the control of the defendants, or some of them. By means of said film defendants are and will continue to be enabled, at such time or times as they see fit, to publicly perform and exhibit or to [84] cause or permit others to publicly perform or exhibit said play reproduced thereon, on television, in motion picture theatres and in any other places or before any audiences in and before which motion pictures may or can be projected and exhibited; but defendants have not threatened and do not intend to perform or exhibit said play hereafter, except to the extent and in the

manner hereinafter in Findings X and XI found. Benny received compensation from CBS for his services in connection with said program and play, and CBS received compensation from American for the production of said program and play and for the rental of the television time upon which said program, including said play, was performed and exhibited upon its channels and network.

IX.

On or about January 30, 1952, Loew's notified CBS that it considered the copying of its motion picture photoplay "Gas Light" and the performance or exhibition of the play "Gas Light" included in said television program to be an infringement of its rights.

X.

On or about May 28, 1953, CBS commenced the preparation of a motion picture, the script for which had theretofore been prepared. Said motion picture was entitled "Auto Light" and was designed and intended to be a remake of the play included in the television program hereinabove in Finding VIII referred to, to be publicly exhibited on television throughout the United States as part of one of five filmed television programs starring Benny, sponsored by, and advertising the products of American, and to be presented, distributed and exhibited by CBS over its channels, national network and affiliated television stations during the year commencing September 13, 1953. Loew's first learned of these facts on June 9, 1953; and immedi-

ately thereafter on said date notified Benny, American and CBS that any repeat performance of or remake of the play hereinabove in Finding [85] VIII referred to would be an infringement of Loew's rights. On June 10, 1953, the within action was commenced and a temporary restraining order was issued, to which order reference is hereby made. On June 11, 1953, said restraining order was modified by an order made pursuant to stipulation of the parties, to which order of modification reference is hereby made, to permit the filming of said proposed motion picture and the development of the negative film thereof, but otherwise maintaining in force the temporary restraining order theretofore issued. Thereafter said restraining order was from time to time modified so as to permit the making of positive prints of said motion picture but otherwise maintaining said restraining order in force; and on November 23, 1953, the within Court issued a preliminary injunction enjoining the defendants, among other things, from performing, distributing, releasing, exhibiting or displaying the said motion picture or the motion picture film hereinabove in Finding VIII referred to.

XI.

It was the intention of defendants to publicly perform and exhibit for profit, and but for said restraining order and preliminary injunction they would have publicly performed and exhibited for profit, the motion picture hereinabove in Finding X referred to, in substantially the same manner, by

the same means and to the same extent as the play and motion picture film hereinabove in Finding VIII referred to were publicly performed and exhibited. Unless defendants continue so to be enjoined and restrained they will so publicly perform and exhibit the motion picture hereinabove in Finding X referred to.

XII.

The motion picture hereinabove in Finding X referred to was copied by CBS in substantial part from the motion picture photoplay "Gas Light" hereinabove in Findings V and VI referred to, [86] without the consent, permission or license of plaintiffs or either of them. The part so copied was and is a substantial part of said play and of the copyrightable and copyrighted material in said motion picture photoplay.

XIII.

The plaintiffs have expressly waived, during the pendency of this action, any right they might have had to recover damages or to have an accounting of profits on account of the matters hereinabove found and have agreed to be limited to injunctive relief; and accordingly, the Court finds, solely because of said waiver, that plaintiffs are not entitled to recover damages or have an accounting of defendants' profits.

XIV.

Plaintiffs have not, nor has either of them, delayed unreasonably in the enforcement of their rights or in the commencement of this action. They have not, nor has either of them, been guilty of

laches; and they are not, nor is either of them, estopped from now asserting or enforcing their rights against defendants, and any or either of them. Plaintiffs acted promptly to assert and notify defendants of their rights upon first learning of the facts hereinabove in Finding VIII found; and acted promptly to enforce those rights upon first learning of defendants' intention again to infringe those rights as hereinabove in Finding X found.

XV.

The copying and use by defendants of the copyrighted material of plaintiffs, as above found, was not and is not a fair use of such material; nor was or is such copying or use made fair by reason of the fact that said material was used by defendants by way of burlesque or parody. [87]

XVI.

With respect to the claim of unfair competition alleged in count three of the complaint herein, the Court finds that the facts alleged in paragraphs II and III of said count are true but that plaintiffs have failed otherwise to sustain the burden of proof imposed upon them in respect of said claim.

Conclusions of Law

1. Loew's is the owner and proprietor of all rights, title and interest in and to the motion picture photoplay "Gas Light" and in and to the copyright thereof.

2. Defendants' copying and use of a substantial

part of the copyrightable and copyrighted material in said motion picture photoplay, as heretofore found, was and is an infringement of said rights, title and interest and of said copyright; and the future or repeated performance or exhibition of the play or motion picture hereinabove in Findings VIII and X referred to, by defendants, or any or either of them, will also be such an infringement.

3. Plaintiffs are entitled to judgment enjoining and restraining defendants; and their or any of their officers, agents, representatives, employees or servants, during the continuance of the copyright hereinabove in Finding VI referred to, or any renewal, renewals, extension or extensions thereof, from using, displaying, performing, exhibiting or in any way copying or reproducing, or causing or permitting anyone else to use, display, perform, exhibit or in any way copy or reproduce, the play or motion picture hereinabove in Finding X referred to, and ordering said defendants to excise and delete from all negatives, positive prints and any other reproductions or recordations of the filmed television program hereinabove in Finding X referred to and of the television program [88] hereinabove in Finding VIII referred to, all uses, reproductions, copies, and recordations of and references to, the play or motion picture hereinabove in Findings VIII and X referred to, and further ordering said defendants to deliver to the Clerk of this Court for destruction as by law provided, all such excised or deleted parts.

4. Plaintiffs are further entitled to judgment for

their taxable costs incurred herein (but not including any attorneys' fee) and to have execution for such costs.

5. The Court is not ordering the issuance at this time of an injunction against use of the television play, and the motion picture film reproducing said play, referred to in Finding VIII, but only because defendants have not threatened or manifested any intention to make any use thereof hereafter. The Court will retain and reserve jurisdiction for the purpose of issuing any injunction which may hereafter be necessary, expedient or proper in protection of plaintiffs' rights with respect to said television play and the motion picture film reproducing said play referred to in Finding VIII hereof.

6. Count three of the complaint herein should be dismissed.

Let Judgment be entered accordingly.

Dated: May 20, 1955.

/s/ JAMES M. CARTER,
District Judge

Approved (Disapproved) as to form as required by Local Rule 7.

WRIGHT, WRIGHT, GREEN & WRIGHT,
RICHARD M. GOLDWATER,
/s/ By CHARLES A. LORING,
Attorneys for defendant Benny [89]

[Endorsed]: Lodged May 17, 1955. Filed May 20, 1955.

In the United States District Court, Southern District of California, Central Division

Civil No. 15602-C

LOEW'S INCORPORATED, a corporation and PATRICK HAMILTON, Plaintiffs,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., et al., Defendants.

JUDGMENT

(For Injunctive and Other Relief Against Infringement by Columbia Broadcasting System, Inc., American Tobacco Company and Jack Benny of Copyright in Motion Picture "Gas Light")

The within cause having been duly tried before the Court, sitting without a jury, and the Court having made and filed its findings of fact and conclusions of law herein, and good cause therefor appearing; Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed as follows:

(1) Defendants Columbia Broadcasting System, Inc., American Tobacco Company, and Jack Benny, and their respective officers, agents, representatives, employees and servants are, and each of them is, enjoined and restrained during and throughout the continuance of [90] the copyright on the motion picture photoplay "Gas Light", of which Loew's Incorporated is the proprietor, and during and throughout any renewal, renewals, extension or ex-

tensions of said copyright, from using, displaying, performing, exhibiting or in any way copying or reproducing, or causing or permitting anyone else to use, display, perform, exhibit or in any way copy or reproduce the whole or any part or portion of that certain filmed television play entitled "Auto Light", starring Jack Benny, the preparation of which was commenced by defendants above named, or one or more of them, on or about May 28, 1953, and which was photographed on film on or about June 11, 1953, which is the same filmed television play which this Court has found to be an infringement of the copyrighted motion picture photoplay "Gas Light."

(2) Defendants Columbia Broadcasting System, Inc., American Tobacco Company and Jack Benny are, and each of them is, ordered to excise and delete within 60 days after this Judgment shall have become final, from all negatives, positive prints and all and any other reproductions and recordations of the filmed television programs starring Jack Benny, one of which was caused to be written and produced by defendants above-named, or one or more of them, on or about January 27, 1952 and the other of which was filmed by said defendants, or one or more of them, on or about June 11, 1953, all uses, reproductions, copies and recordations of and references to the play or motion picture variously entitled "Gas Light" or "Auto Light" included as part of said filmed television programs, and which is the same play and motion picture which this Court has found to be an infringement of the copy-

righted motion picture photoplay "Gas Light."

(3) Defendants Columbia Broadcasting System, Inc., American Tobacco Company and Jack Benny are ordered to deliver within 60 days after this Judgment shall have become final to the Clerk of this Court for destruction as by law provided, all such excised and deleted parts, as provided in Paragraph 2 [91] of this Judgment.

(4) Count three of the complaint herein is dismissed.

(5) The Court reserves and retains jurisdiction of this cause for the purpose of issuing any injunction which may hereafter be necessary, expedient or proper in protection of the rights of Loew's Incorporated as proprietor of all rights, title and interest in and to its motion picture "Gas Light", and as proprietor of the copyright thereof, with respect to the television play, entitled "Gas Light", produced by said defendants, or one or more of them, on or about January 27, 1952, and its reproduction on film, which are the same television play and film which this Court has found to be an infringement of the copyrighted motion picture photoplay, "Gas Light."

(6) Plaintiffs shall have and recover their costs incurred herein (but not including attorneys' fees), which costs are hereby taxed in the sum of $200.95, and the plaintiffs shall have execution thereon.

(7) The action is dismissed as to Columbia Broadcasting System, Inc. of California and as to all fictitious defendants.

The Clerk is ordered to enter this judgment forthwith.

Dated: May 20, 1955.

/s/ JAMES M. CARTER,
Judge [92]

[Endorsed]: Lodged May 17, 1955. Filed May 20, 1955. Entered May 23, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Jack Benny, a defendant in the above entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on the 23rd day of May, 1955.

Dated: June 17th, 1955.

LOYD WRIGHT,
RICHARD M. GOLDWATER,
CHARLES A. LORING,
WRIGHT, WRIGHT, GREEN & WRIGHT.

/s/ By CHARLES A. LORING,

Attorneys for Defendant and Appellant, Jack Benny [93]

Affidavit of Service by Mail attached. [94]

[Endorsed]: Filed June 17, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendants Columbia Broadcasting System, Inc., and American Tobacco Company, and each of them, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 23, 1955.

O'MELVENY & MYERS,
s/ By ERNEST M. CLARK, JR.,
Attorneys for Defendants Columbia Broadcasting System, Inc., and American Tobacco Company. [95]

Affidavit of Service by Mail attached. [96]

[Endorsed]: Filed June 21, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE AND DOCKET THE RECORD ON APPEAL

Whereas, the clerk of the above-entitled court desires additional time to prepare the record on appeal in the above-entitled case,

It Is Hereby Ordered that the time for filing and docketing the record on appeal in said case is extended, as permitted by Rule 73(g) of the Federal Rules of Civil Procedure, to and including September 16, 1955, which said date is ninety days from

the date of filing the first notice of appeal in said case.

Dated: July 21, 1955.

/s/ JAMES M. CARTER,
District Judge [100]

[Endorsed]: Filed July 21, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING AND DOCKETING APPEAL

Good cause appearing therefore,

It is Ordered that the time within which the Clerk may file and docket the record on Appeal in the above entitled matter be and the same is hereby extended to and including September 15, 1955.

Dated: July 23, 1955.

/s/ JAMES M. CARTER,
Judge of the U. S. District Court

[Endorsed]: Filed July 22, 1955.

[Title of District Court and Cause.]

STIPULATION THAT EXHIBITS MAY BE CONSIDERED IN THEIR ORIGINAL FORM

It Is Hereby Stipulated by and between the parties hereto through their respective counsel

that the Exhibits in the above entitled matter may be considered by the Court of Appeal in their original form without the necessity of reproduction in the record; said Exhibits consist of Books, Motion Picture Manuscripts, Positive Prints of Motion Pictures, Transcriptions of Radio Programs, Positive Prints of Television Programs and similar material which would be costly to print or reproduce in other form and which can be best observed in their original form.

Dated: October 27, 1955.

LOEB & LOEB, and
HERMAN F. SELVIN,
s/ By HERMAN F. SELVIN,
Attorneys for Plaintiffs and Respondents, Loew's Inc. and Patrick Hamilton.

O'MELVENY & MYERS,
HOMER MITCHELL,
ERNEST CLARK,
s/ By W. B. CARMAN,
Attorneys for Defendants Appellants, Columbia Broadcasting System, Inc. and American Tobacco Company

WRIGHT, WRIGHT, GREEN & WRIGHT,
LOYD WRIGHT,
RICHARD M. GOLDWATER,
s/ By D. K. WRIGHT,
Attorneys for Defendant Appellant, Jack Benny

[Endorsed]: Filed October 28, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 107, inclusive, contain the original

Complaint;

Order to Show Cause and Temporary Restraining Order;

Affidavit of Rudolf Monta;

Memorandum of Points and Authorities;

Order Modifying Temporary Restraining Order;

Answer of Jack Benny;

Answer of CBS, Inc. and American Tobacco Co.;

Preliminary Injunction;

Stipulation of Fact and Order Thereon;

Stipulation as to the Approximate Size of the Audience for Jack Benny Television programs; (which is also exhibit (deft) fifteen (15);

Stipulation re. Introduction into evidence of drama "Arizona" and Burlesque thereof;

Findings of Fact and Conclusions of Law;

Judgment;

Notice of Appeal (Jack Benny);

Notice of Appeal (CBS);

Designation of Contents of Record (CBS);

Order Extending Time to Docket Record (CBS);

Designation of Contents of Record (Jack Benny);

Order Extending Time to Docket Record (Jack Benny);

which, together with the original plaintiffs' exhibits 1, 3, 4A, B, C, D, 5A, B, C, D, 7, 9, 11, 12, 13, 15 (which is Stipulation as to approximate size of Jack Benny TV Audience and part of transcript) 16 and 17; and one volume of Reporter's Transcript of Proceedings, all in the above entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record (as to both Notices of Appeal) amount to $4.00, which sum has been paid by appellants.

Witness my hand and the seal of said District Court, this 28th day of October, 1955.

[Seal] s/ EDMUND L. SMITH,
Clerk

s/ By CHARLES E. JONES,
Deputy

In the United States District Court, Southern District of California, Central Division

No. 15602-C—Civil

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON, Plaintiffs,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., et al., Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Tuesday, Jan. 5, 1954

Honorable James M. Carter, Judge presiding.

Appearances: For the Plaintiffs: Loeb & Loeb by Herman Selvin and Harry L. Gershon. For the Defendants Columbia Broadcasting System, Inc., and American Tobacco Co.: O'Melveny & Myers by Homer I. Mitchell and Ernest M. Clark, Jr. For the Defendant Jack Benny: Wright, Wright, Green & Wright By Charles A. Loring and Richard M. Goldwater. [1*]

(Other court matters.)

The Clerk: No. 15602-C Civil, Loew's Incorporated, and others, vs. Columbia Broadcasting System, Inc., Columbia Broadcasting System, Inc. of California, and American Tobacco Company, and Jack Benny, for trial.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Mr. Selvin: Ready for plaintiffs.

Mr. Mitchell: Ready for the defendant Columbia Broadcasting System, Inc. and American Tobacco Company.

Mr. Goldwater: Ready for the defendant Jack Benny.

The Court: All right. Proceed.

Mr. Selvin: At this time I think the cause should be dismissed as to fictitiously named defendants, and also Columbia Broadcasting System, Inc. of California.

My request in that regard being based on Mr. Mitchell's assurance that that concern had nothing whatever to do with the transactions complained of here.

The Court: The motion will be granted.

Mr. Selvin: The parties have agreed on a stipulation of facts, an original and copy of which I would now like to hand to your Honor, and it provides for approval by your Honor.

You will note in addition to providing for the admission subject to the objections of the parties of certain exhibits, it reserves to the parties objections to any of the [2] facts stipulated to and reserves to them the right to produce additional evidence.

Unless your Honor desires some other form of procedure I should like at this time to offer up the various exhibits identified in the stipulation in order that they may be received and marked, except certain ones as to which we have objections.

The Court: I was just checking. Your pretrial

stipulation doesn't list the issues of law and fact to be decided but I take it they are relatively simple.

Mr. Selvin: That is true. That stipulation was not intended strictly as a pretrial stipulation, but as a stipulation of at least the principal facts.

I might point out, your Honor in connection with the reservation contained in the stipulation, at the appropriate time, which I assume will be when the defendants put on their case, I intend to interpose objections to certain portions of the stipulation, principally paragraph 13 thereof, but I think that can be deferred until the defendants' case, particularly since I know Mr. Mitchell is very anxious to have his witness Dr. Baxter finish before 3:30 this afternoon. So we can defer that until after Dr. Baxter has testified.

The Court: You may.

Mr. Selvin: I shall offer, first, as the exhibit referred to as Exhibit 1 in the stipulation a copy of the plaintiff [3] Patrick Hamilton's play Gas Light as published and registered for copyright.

The Court: Received as Exhibit 1, in evidence.

What pages are these exhibits listed on?

Mr. Selvin: That is listed on page 8.

Mr. Mitchell: Page 4.

Mr. Selvin: That is right, page 4, line 21.

(The document referred to was marked Exhibit 1, and was received in evidence.)

Mr. Selvin: The exhibit referred to as 2 is the motion picture of the plaintiff Loew's entitled Gas Light, and I understand there that we are agreed

that instead of bringing the inflammable prints into court, since your Honor has already seen an exhibition of the picture, that they may be given that number in absentia and deemed in evidence for all purposes in this cause.

Mr. Mitchell: So stipulated.

The Clerk: What is that,—a positive print?

Mr. Selvin: Positive print. And it may be retained in the possession of the plaintiff subject to production whenever required in the case.

Mr. Mitchell: Yes.

The Clerk: That would be a positive print of the motion picture,—what is the title, Gas Light?

Mr. Selvin: Yes. [4]

The Court: And will be produced for exhibition to the Circuit?

Mr. Selvin: In this or any other court to which the matter may go.

The Court: Did you say "may go"? All right. That stipulation is approved and the positive print in absentia will be received as Exhibit 2 in evidence.

(The print referred to was received in evidence as Exhibit 2.)

Mr. Selvin: Exhibit 3, which is referred to at page 8, line 20, of the stipulation, is a copy of the so-called cutting continuity of the motion picture Exhibit 2. A copy of that is already in the files of this court in connection with the proceedings on the application for temporary restraining order, and may be marked Exhibit 3 by reference.

The Court: It may be marked Exhibit 3 and received in evidence.

(The cutting continuity referred to was marked Exhibit 3 and was received in evidence.)

Mr. Selvin: I think it is attached to the affidavit of Rudolf Monta.

The Court: That is the cutting continuity of the play Gas Light, is that right?

Mr. Selvin: Yes, your Honor.

The Clerk: The document in the file which bears a filing [5] date of June 10, 1953, according to counsel——

Mr. Mitchell: That is the cutting continuity of the motion picture photoplay.

The Court: I have a copy of it, too.

Mr. Selvin: Since there have been references to the Circuit, your Honor, may I state for the record that a cutting continuity is a written description scene by scene of the action and dialogue of the motion picture, customarily prepared in connection with all feature motion pictures for record and file purposes. In other words, it provides a convenient method of ascertaining what is in the picture and in what part of the picture it is found.

The next series of exhibits marked 4-A through 4-D, respectively, in the stipulation refer to scripts of certain radio programs presented by the defendant Benny at one time or another. I will offer up copies of those scripts, or I think the defendants have them, and ask as far as we are concerned that they be marked only for identification at this time, because they are embraced within the objec-

tion that I desire to make later in the proceedings to their admissibility.

The Court: Who is going to hand them up?

Mr. Mitchell: I will produce them, your Honor.

What we have done in presenting to you examples is to have the plaintiff select as examples two scripts, and we [6] have selected as examples two scripts. The ones selected by plaintiff are a script of Mutiny on Jello, broadcast on January 5, 1936, over the radio, which should be marked for identification at this time Exhibit 4-A. In connection with that I want to say that this is the only existing script of this broadcast and I would like to have permission to substitute for it a photostatic copy in order that Mr. Benny may retain the sole remaining copy.

Mr. Selvin: We are willing so to stipulate. In fact, we are willing to stipulate with respect to any exhibit, other than the motion picture prints, that the parties may withdraw them for the purpose of making copies and substituting copies if desired.

The Court: That will be the understanding.

You say this was one of the examples selected by the plaintiff?

Mr. Mitchell: That is correct.

The Court: All right.

Mr. Mitchell: The plaintiff also selected as an example the script of a radio broadcast on January 27, 1952, of a skit or play Dr. Jekyl and Mr. Hyde, which should be marked for identification at this time as Exhibit 4-B.

The Court: It will be so marked.

(The documents referred to were marked Exhibits 4-A and 4-B, for identification.) [7]

Mr. Selvin: We have selected them, in the event the facts stipulated to in paragraph 13 of the stipulation are admitted in evidence, and that is why at the moment they are only being marked for identification, since we do object to that entire paragraph on various grounds.

The Court: I understand.

Mr. Mitchell: As Exhibit 4-C we would like to have marked for identification a script, which was selected by us, of a radio broadcast on September 18, 1949, of Edward, My Son.

The Court: It will be marked 4-C for identification.

(The document referred to was marked Exhibit 4-C, for identification.)

Mr. Mitchell: And due to a mix-up in our arrangements with the plaintiffs, we would like to hold 4-D until after lunch, if we may have that marked at that time, since we haven't had an opportunity to examine the motion picture script.

Mr. Selvin: Very well.

The Court: All right.

Mr. Selvin: I will continue.

The group of exhibits referred to in the stipulation as 5-A through 5-D, your Honor, are the cutting continuities of the motion pictures, which were supposedly parodied, satirized or burlesqued by the programs reflected by Exhibit 4. [8]

The Court: So these will be, also, marked for identification?

Mr. Selvin: Yes.

The Court: We will give the corresponding numbers, as far as the letters are concerned. 5-A——

Mr. Selvin: Will be the cutting continuity of the motion picture Mutiny on The Bounty; and 5-B, for identification, will be the cutting continuity of the motion picture Dr. Jekyl and Mr. Hyde.

The Court: It will be so marked.

(The documents referred to were marked Exhibits 5-A and 5-B, for identification.)

Mr. Selvin: And 5-C, for identification, will be the cutting continuity of the motion picture Edward, My Son.

The Court: It will be so marked.

(The document referred to was marked Exhibit 5-C, for identification.)

Mr. Selvin: And then 5-D may be reserved for the cutting continuity of whichever radio program the defendants select later.

The Court: All right.

Mr. Selvin: In the stipulation Exhibit No. 6 is the transcription of the radio program which your Honor, I believe, has already heard, and which I understand may be marked in absentia as was the motion picture, and retained in the [9] possession of the defendants subject to the same conditions and requirements.

The Court: Is that satisfactory?

Mr. Mitchell: Yes, that is satisfactory.

(The transcription referred to was marked Exhibit 6, for identification.)

Mr. Selvin: We have an objection to that particular exhibit, which will take me only a moment to state, and I might as well state it now for the record, and it can be ruled upon later; and that is evidence of that particular program and of any burlesque, parody, or satire of the motion picture Gas Light, which might have taken place on that program, is entirely immaterial and irrelevant, in that the stipulated facts show affirmatively that that particular use of the motion picture on that program was expressly orally licensed by the plaintiff, but a license to make a particular use, of course, does not extend to make any other or different use, and upon that ground we claim it is irrelevant and immaterial in this matter.

The Court: Does the stipulation of facts show that it was already licensed?

Mr. Selvin: The stipulation of facts relates to evidentiary material relating to a request made of Mr. Mayer of Loew's, and Mr. Mayer's response to it, of which we say that shows a license or consent. The defendants perhaps will [10] contend it doesn't.

Mr. Mitchell: We don't concede there was any license of that use at all, but the stipulation of facts in paragraph 17 shows a discussion between Louis B. Mayer and representatives of the defendants with respect to that particular program.

The Court: Exhibit 6 being marked by the plaintiff but not being offered by the plaintiff?

Mr. Selvin: We are just marking them all in order. The stipulation, unfortunately, did not dis-

tinguish between plaintiffs' and defendants' exhibits. We are not offering it, but since it is one of the exhibits identified in the stipulation, in order to preserve the continuity of numbering I am suggesting now that it be marked for identification.

The Court: It will be marked for identification. That radio program was in 1945, was it not?

Mr. Selvin: That is my recollection.

Mr. Mitchell: That is correct. That is referred to at the bottom of page 18 and the top of page 19 of the stipulation.

Mr. Selvin: Subject to the same conditions and the same objection on our part is the next identified exhibit No. 7, which is the script of that radio program.

Mr. Mitchell: We have the script here, which we will hand to the clerk for the purpose of having it marked. [11]

The Clerk: Is this just for identification?

Mr. Selvin: Just for identification, yes, at this time.

The Court: I think that script is already in the file here.

Mr. Mitchell: Not the 1945 one, your Honor.

The Court: Pardon me. It was the '52. Yes. It will be marked 7 for identification only. They are marked just as plain exhibits, not Plaintiffs' or Defendants'.

Mr. Selvin: There won't be any confusion, because I think there are only twelve exhibits all told.

No. 8 in the stipulation is the positive print of the first Benny television program. By "first" I

mean the first one referred to in this case, that is, the 1952 program and that may be marked and admitted in evidence subject to the same conditions as we agreed to with respect to the motion picture print, except custody in this case will be with the defendants, rather than the plaintiffs.

The Court: Is that satisfactory?

Mr. Mitchell: That is satisfactory.

The Court: Received in evidence is Exhibit 8.

(The print referred to was marked Exhibit 8, and was received in evidence.)

Mr. Mitchell: I think we should have a stipulation on that particular television motion picture, that with the exception of some details it is in substance the same as the [12] proposed television broadcast to be broadcast in 1953, which was actually photographed—I mean to be broadcast in 1954, which was actually filmed in June, 1953, since the court saw the June 1953 proposed television program and did not take time to see the kinescope of the live broadcast of 1952. But they are so nearly the same that we thought we could enter into a stipulation that they are substantially the same.

Mr. Selvin: They are substantially the same. There are some details which would be apparent from inspection, but by and large they are certainly substantially the same.

The Court: All right.

Mr. Selvin: Exhibit 9 in the stipulation is the script of the program, the 1952 program to which we have just referred, and that may be marked by reference on the copy already on file.

The Court: It will be received in evidence as Exhibit 9. That is the one the court has a copy in the file.

Mr. Selvin: Actually the copy is the one that the judge had.

The Court: There must be an original on file, also.

If the clerk can't find the original, you may use the copy which I have.

The Clerk: We found it, your Honor. The original is in the file under the filing date June 10, 1953.

The Court: Mark it Exhibit 9 in evidence. [13]

(The document referred to was marked Exhibit 9, and was received in evidence.)

Mr. Selvin: In the stipulation Exhibit 10 is the print of the proposed television program, which the court I understand has seen.

The Court: The record will show that I saw it.

Mr. Selvin: And which we may mark Exhibit 10 in absentia, and subject to the stipulation respecting its custody, which is already on file.

Mr. Mitchell: That is satisfactory.

There is one thing about that particular film as you and the court observed. The film has not actually been completed in the sense that the sound track and the picture track have not been consolidated, which may make it a little difficult to show if there should be further showings required, and I assume that there will be no objection if we at a point consolidate the sound track and the picture track, so that it can be shown on a conventional

machine, rather than in the complex way that it was shown to the court.

Mr. Selvin: No, there will be no objection to making a consolidated print for the purposes of this case.

Mr. Mitchell: And that consolidated print being the same as what the court has seen will be this exhibit that we are talking about?

Mr. Selvin: The only difference will be that the sound [14] and the vision will be on one piece of celluloid, instead of on two separate tangible mediums.

The Court: All right, Exhibit 10 received in evidence with those understandings.

(The print referred to was received in evidence as Exhibit 10.)

The Clerk: That was to remain in whose possession, plaintiff or defendant?

Mr. Selvin: That is in the possession of the laboratories right now, but there is a stipulation on file regulating the custody and possession of that particular exhibit?

It is Consolidated Film Laboratories that I think has the actual possession of it.

Mr. Mitchell: Correct.

Mr. Selvin: In the stipulation Exhibit 11 is the script of the program to which we have just referred, a copy of which may be received now.

Mr. Mitchell: We have the script which is designated "As Filmed," which serves the same purpose as—what does Metro call theirs?

Mr. Selvin: Cutting continuity.

Mr. Mitchell: Yes, cutting continuity script.

The Court: It will be received in evidence as Exhibit 11.

(The exhibit referred to was marked Exhibit 11, and was received in evidence.) [15]

Mr. Selvin: Those are all the exhibits identified in the stipulation, and I think the plaintiffs' prima facie case is made out by the stipulation and the exhibits.

The Court: You mentioned 12 before.

Mr. Selvin: 12 is a possibility, in the event the objection to paragraph 13 is overruled and Exhibits 4 and 5 come into evidence, then we would want to offer the actual prints of the four motion pictures involved.

The Court: All right.

Plaintiff rests, then?

Mr. Selvin: I beg your pardon?

The Court: Plaintiff rests, then?

Mr. Selvin: Yes.

Mr. Mitchell: Is the circumstance such now that these various paragraphs of the stipulation, with the exception of the one that you want to object to, are in evidence?

Actually the stipulation provides for the introduction of these facts in evidence, and I think before you rest maybe to make the record clear we should get in the evidence.

Mr. Selvin: I think your suggestion is a good one, and therefore I will offer all of the stipulation in evidence, except the paragraph number 13.

The Court: All of the stipulation of facts ap-

proved by me this date and filed with the clerk, except paragraph 13, is received in evidence. [16]

Mr. Selvin: And except the exhibits which have been marked for identification only.

The Court: All right.

Now, plaintiff rests?

Mr. Selvin: Yes, your Honor.

Mr. Mitchell: Your Honor, I have one witness I would like to call. Dr. Frank Baxter.

The Court: As part of the plaintiffs' case, before plaintiff rested, is the fact that I saw the showing of Exhibit 10, the print of the TV 1953 program, and I heard the radio program, which has been marked for identification.

Mr. Mitchell: And you saw the motion picture Gas Light, which has been admitted in evidence.

The Court: And saw the motion picture Gas Light, which is Exhibit 2.

FRANK C. BAXTER

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Frank C. Baxter.

Direct Examination

Q. (By Mr. Mitchell): What is your occupation, Dr. Baxter? [17]

A. I am a university teacher, Mr. Mitchell.

Q. At what university?

(Testimony of Frank C. Baxter.)

A. University of Southern California, where I have been since 1930.

Mr. Selvin: Dr. Baxter, can you keep your voice up, please?

The Witness: Surely.

Mr. Selvin: This is a large court room.

The Witness: I have been at the University of Southern California since 1930.

Q. (By Mr. Mitchell): What subject do you teach?

A. English Literature, particularly Shakespeare and the drama and English humor.

Q. You are a graduate of a university?

A. Yes, I took my A.B. and M.A. at the University of Pennsylvania, and then went to England where I received my Ph.D. at the University of Cambridge. I was a member of Trinity College. Subsequently I did some further graduate work at the University of California at Berkeley.

Q. And what particular experience have you had in the field of English literature?

A. As a teacher, and that presupposes, of course, a reader, I have devoted my life to it. I taught at the University of Pennsylvania for some years, at Swarthmore College in Pennsylvania, and after my return from England [18] went to Berkeley for one year, and subsequently I have been at the University of Southern California. I have read as much as I possibly could, and that is my only claim to being here, I suppose.

(Testimony of Frank C. Baxter.)

Q. And the particular phases of English literature that you specialized in are what?

A. The drama in the broad sense, Shakespeare in particular, and in recent years I have been doing more and more with the Shakespeare; and the history of English humor, English humorists is a course I have had for many years. With that Elizabethan Literature, a course every other year or so.

Q. More recently have you had some educational work in connection with television?

A. Yes, I have. In sort of a pioneering way we have endeavored to give a course for credit on television on Shakespeare, and the responses of course far exceeded our expectation. We have some 1250 students enrolled for credit, and a certified listening or viewing audience of about 450,000.

Q. You say "we"; who do you mean by "we"?

A. Well, I, if you will, the program, Shakespeare and I.

Q. Does that have anything to do with the university?

A. Oh, yes. This I am doing as part of my university function. [19]

Q. In connection with your studies and work can you define for us the terms burlesque, parody, satire, and travesty?

A. All these, of course, are terms that are used loosely, and in any given point the exact definition has to be determined pretty much by context. Nonetheless, the philosophers and students of the comic understand very specific things by these terms.

(Testimony of Frank C. Baxter.)

They are all, of course, manifestations of the comic spirit; they are comic forms and tones of literature.

Satire is the broadest of these, perhaps, and the most easily defined, for satire as someone wisely said is taking sides in a war of values. Satire sets up one code and tests things against it. And satire seeks to change, it seeks to criticize, to change, sometimes even to annihilate. It is a rather intense thing. You define satire in terms of its purpose, which is to make fun of, to destroy, to punish, to annihilate.

Now, that is the most corrosive form of humor, it deals with the sardonic and all sorts of things.

Burlesque and parody are sort of side by side. They balance like the pans of a scale. Parody, as I see it, is the taking off of something. You can't have burlesque and parody unless you have something to begin with. The first literature couldn't have been burlesque or parody. It presupposes the existence of something. Parody likes to [20] take a noble form and fill it with nonsense, it accentuates form, parody. If you want to parody Hamlet, you keep Hamlet, all right, but you, oh, say, "To drink or not to drink?" and in place of "Get thee to a nunnery," "Get thee to a brewery."

Parody calls attention to the form. There is scarcely an important Englishman of letters who at one time or another has not written parody.

Burlesque, on the other hand, takes serious elements from an original and plays with it. It trans-

(Testimony of Frank C. Baxter.)

poses a tone, it takes serious elements and takes them out. It isn't interested in form particularly, burlesque. It is sort of a happy toying with things as a dog toys with a bone. Now, the interest is not in the form, then, but in transposing the substance into the realm of the comic, taking it out, having fun with things, and burlesque does that.

To burlesque Hamlet, you take Hamlet as it is, but have "To be or not to be" read by a man in a bathing suit while seated on an ice cake, or having him with a broad mid-Western accent, or an Irish accent, or whatever you will. Burlesque is a toying with serious things.

Now, travesty carries this further, and travesty tends to be longer than burlesque. Burlesque is generally a short literary thing. Travesty generally takes something and transposes it violently, I think, from my feeling of the word, at all points. That is, you take W. S. Gilbert, the great Gilbert [21] of Gilbert and Sullivan, took Hamlet and wrote a play called Rosencrantz and Guildenstern, and from one end to the other the play is transposed into a comic key.

I don't know whether that answers your question.

Q. I think so. What is the first use of burlesque of which you have any knowledge?

A. This is a long story, Mr. Mitchell. Almost at the emergence of literature——

Mr. Selvin: Just a moment. We will object to any testimony along that line, upon the ground that it does not tend to prove or disprove any issue in

(Testimony of Frank C. Baxter.)

this case. The question here is what rights were conferred by the plaintiffs' copyrights, and have any of those rights been infringed; not what may or may not have been done either in ancient, early, recent, or medieval times.

The Court: The objection is overruled, and I am going to hear something about the origin of burlesque and what it means. I don't mean by that, however, to foreclose you on your objection, which I understand you are going to make, that because somebody burlesques a play, that that has anything to do with whether this can be burlesqued.

The objection is overruled.

The Witness: The greatest book, of course, in the ancient Greek world was the Iliad, and the Odyssey of Homer. Two great poems which in a way served as a sort of bible, for the [22] gods and the heroes met in that story and all of Greek literature flowed from him. It is very interesting, emerging at the very dawn of western literature you find simultaneously with Homer burlesques of Homer.

Now, whereas the Iliad deals with the heroic fighting of the Greeks, Agamemnon, Hector, and all those people, you find right with that the Battle of the Frogs and Mice, the Batrachomyomachia, which we will call The Battle of The Frogs and Mice.

Now, there is a true burlesque, because it takes the serious Homer, and here instead of having the great Achilles tilting lances at Hector, you get

(Testimony of Frank C. Baxter.)

frogs versus mice, and they talk with all the heroic language, all the tone, all the grand boastfulness of the Greek heroes.

There are also known and in part existing in fragments other burlesques of Homer as early as the sixth and perhaps the late seventh century B.C.

It is interesting in the Greek drama, which we will think of as being very poetic and tragic and intense, and an all-religious thing, which it was, where you had once a year at the Feast of the Dionysia at Athens three serious plays in an afternoon, all of them involved, again, with gods and men. This was a religious festival held once a year in honor of Dionysos. These people who flocked there with devotion saw three serious plays dealing with the heroes [23] and the gods. At the end of the afternoon there was a fourth play in which the same actors in the same costumes, often playing the same roles, put on a burlesque, violent, and sometimes even obscene burlesque of serious materials that had been dealt with earlier in th afternoon. We have the Cyclops, of Euripides, as the great remaining example of that, though there are selections, fragments remaining in the Greek Anthology, and elsewhere, of that sort of burlesquing material which ended the solemn day.

That seems to me to be a very interesting point, because burlesque, as I see it, through the centuries has been a way that man has been able to go on living in the face of the obscurity of things. He can be serious so long and then he must somehow

(Testimony of Frank C. Baxter.)

escape for a moment from that tension, and it seems to me most exciting that these Greeks would have these serious plays and then the burlesque to follow.

Aristophanes brings on to the stage in his plays in one very famous scene Euripides and Sophocles, whose contemporary reputation was tremendous, and here each one parodies his own style, that is, the character parodies the style of the original, and they talk. All through, of course, Aristophanes you have a general burlesque of things, general satirizing that relieves the tension of life. This so much in the Middle Ages.

We think of the Middle Ages as sort of a stained glass [24] window cathedral time. We think of people waiting around as though life was suspended. What the scholar knows about the Middle Ages makes it a human business.

Agnes Repplier once said how high the tide of laughter beat in the Middle Ages we can only guess by the height of the walls the church erected to keep it within bounds, for it may seem very strange to you to know that there are innumerable burlesques of the Mass, which were very popular in the Middle Ages, of the Creed, and of saints' lives. Some of those of saints' lives are just as absurd as the burlesques of Dragnet, St. George or Dragnet. That sort of thing where it is transposed utterly to another key. The type we think to have tremendous religious convictions. Maybe the fact that it was so solid with them, their faith, was why they could play with it a little; and they did certainly.

(Testimony of Frank C. Baxter.)

You have the most amazing burlesque motifs in Gothic carving, the faces of bishops. You have at Winchester Cathedral, for instance, a bishop who is really a fox dressed as a bishop and he is lecturing to a lot of geese, while from the gown behind hangs out the limp neck of a goose.

They laughed a lot at these, saints' lives, psalms, and the Middle Ages is really a paradise for a student of the comic, because you find everywhere this willingness to dabble lightly with even the things they most feared.

You take, for instance, in the late Middle Ages and the [25] coming of the Renaissance the Dance of Death, where they made fun, again to lighten the tenseness, they made fun of the sort of sudden death that overtakes men in those days when most children died in the first year of birth, when most women died before thirty and in childbirth, and most men died long before they were forty. Death was everywhere and yet they jested with it. Man has always laughed, it seems to me, in order that he may undergo and endure what a poet once called the asperity of the now, of the imminence.

Q. I would like you to address yourself, Dr. Baxter, particularly to examples of burlesques of pieces of literature through the history of burlesque, doing it briefly and in an outline form.

A. I wish we had more time——

The Court: Now, could I tell you what I am interested in?

(Testimony of Frank C. Baxter.)

Mr. Mitchell: We are interested in what you are interested in, your Honor.

The Court: There is no doubt that this is very interesting and gives us a little picture and background of what burlesque is, and if we have any dispute we could probably call many TV programs sort of a burlesque. I am more interested in what went on in England at the times of the beginning of the theatre as we know it as such, what types of burlesque were then put on. That is something I know very [26] little about. I am more interested in that than I am in literature from antiquity.

Mr. Mitchell: My question was addressed to getting just to that sort of thing, your Honor. And you understand what the court is interested in and what I have told you that we are interested in having you inform the court on?

The Witness: The drama had to be reinvented in the Western world after about 1000, and all through the early religious dramas which gave us our drama you do find burlesque elements. They made fun, for instance, of Joseph, who after all is in a rather unenviable position, in The Christian. They make fun of him.

I think it is more interesting to get down to the drama in Shakespeare's day, the great Elizabethan drama. Almost in the dawn of that you have Peele, George Peele, writing a play called The Old Wives' Tale, in which he hits at half a dozen contemporary writers by parodying and burlesquing their sort of romanticism. More interesting, I think, is The

(Testimony of Frank C. Baxter.)

Knight of the Burning Pestle, which comes about 1610, in that you have whole incidents taken from other people's plays.

There was Francis Beaumont, who wrote there, and he parodied all sorts of people. For instance, there was a new sort of drama in which an apprentice, English apprentice, proves equal to twenty-seven Turks in single combat. That is in there. Shakespeare laughed at John Lyly, a contemporary dramatist [27] who went in for rather fancy and beautifully ornamented sort of stuff, and everyone knew that Lyly was being laughed at in Love's Labour's Lost, in the fancy language spoken by Osric in Hamlet. That is pure Lyly, everyone knew that. Euphuism, as it was called.

When you get down a little later you see drama and dramatic burlesque everywhere. After the Restoration of 1660, when the king returned from exile, King Charles II, there is almost immediately a turning of wit and humor toward the theatre itself. The theatre has always laughed at itself, and here you see one of the classic examples, 1671, in a play called The Rehearsal, The Rehearsal by the Duke of Buckingham. In that play John Dryden, particularly, the enemy of Buckingham, is treated rather cavalierly, for you have themes of Dryden's made fun of. The very language of Dryden, his figures of speech, incidents from his plays, the tones of his plays, made fun of in what is perhaps I should think No. 2 among all English dramatic burlesques, that famous one of 1671, The Rehearsal of

(Testimony of Frank C. Baxter.)

Buckingham. Everyone who saw it recognized, of course, that the poet laureate John Dryden was being burlesqued. It is a great age of satire. And we can solidify this tremendously by the way these people responded. All through the eighteenth century the theatre laughs at itself.

Q. Can you give examples through the eighteenth century [28] of where the burlesquers have used the plays or literature, using plot, incidents, characters, and those parts of the originals?

A. Yes. The novel perhaps you know is a recent invention, it came about 1740, the novel as we know it with its psychological concern, and the first novel is generally considered to be Pamela by Samuel Richardson. It is a story of a servant girl who is virtuous, who finds herself being chased around the block by her master, a young gentleman named Mr. B, and he has inherited her as a servant at his mother's death, with all the other servants in this great country house, he forms this romantic loping attachment for her, and she evades him, and though the book is a series of letters in which she writes to her father, from our point of view it is rather amusing. She is in battle, she pushed the settee against the door and writes twenty pages to her father.

There was something of the good sense of the eighteenth century that found this laughable. This girl is not only virtuous, but she talks about it all the time.

So one of the happiest people in the world, Henry

(Testimony of Frank C. Baxter.)

Fielding, wrote a burlesque called Shamela. The first was Pamela, and this is the burlesque way of doing things, you call it Shamela. In here the girl goes through all the things that happened to her. While it is shorter than the [29] original, the key incidents are used. The girl is pursued by her master, but her retreat is strategic, rather tactical, rather than ideological. She lures him, and she jumps out at him, and she disappears, she baits him, and she is a calculating little wench. And of course it is a magnificent burlesque, and you follow point by point the events, the significant events of Pamela, in this Shamela. It was so successful that Henry Fielding, the father of the English novel, came back in the next year 1742 with Joseph Andrews.

This is a famous old novel. In this you have a young footman who is pursued by his mistress. You see the transposing trick of burlesque, and Joseph Andrews is a virtuous young gentleman who is conscious of his virtue and talks of it, and he is pursued by his mistress, and she chases him around the block, to sum it up neatly.

Soon Fielding, introduced certain characters who became so three-dimensional and so much alive that he changed the nature of his burlesque and made it a novel in its own right, what he called the comic epic, but it begins with the burlesque, again, of Richardson, focused right on this particular book.

All through the eighteenth century you can find such things. Sheridan's The Critic is clearly directed at three or four playwrights of the day. That

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is probably the greatest, I think, of English dramatic burlesques, The Critic by Sheridan, [30] in that he laughs at three or four people. This thing goes on all through the eighteenth century.

Q. Does The Critic use excerpts from the originals in terms of incidents, characters, and so on?

A. Yes, he does.

May I show you this, which is one of my treasures? This is a book written by Dryden back in the old century, a very serious work for him, for it was a declaration of his faith, The Hind and The Panther, a poem in three parts, 1687. It is in verse, and in a sort of Aesop's Fable sets forth the various religious parties of the day. The milk white hind is the Catholic Church, the panther is the Church of England; the timid, quaking hare is the Quaker, the bristling boar the Baptist. And they all go through this, and it is a solemn declaration of faith, all of this. Two of his enemies politically and two wags of the day brought out in the same year this book (indicating), and many men I think bought this one thinking they were getting this one (indicating). The format is practically the same. What it does is change the panther and the milk white hind to the town mouse and country mouse, and from the very first line it is burlesqued, line by line, with a lot of intruded comment in prose to make it very clear.

This is one of the very famous literary burlesques, The Hind and The Panther, and The Hind

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and The Panther transposed by a man named Prior and another named Montagu. [31]

The Court: There wasn't any copyright law in England at that time?

The Witness: Not in the modern sense. Only the stay of titles.

May I continue?

Q. (By Mr. Mitchell): Yes. I would like for you to continue with some examples along the line that the court is inquiring about, examples of burlesques of plays and perhaps books, where the material in the book is used as a basis for the burlesque.

A. One thing of course that held down a great deal of burlesque was this—it is amazing there is so much—but there were only two licensed theatres in London from 1660 to about 1850, there were these two licensed theatres. When times were very good and business was good the British officialdom didn't interfere with little theatres that sprang up, but whenever times got hard they put them down. So the big theatres were engaged in solemn undertakings of one sort or another, and there was no place they could be burlesqued. But after 1850 it seems to me the floodgates opened, and a little later I would like to give you a list of some of these burlesques which you can see by the title to be true burlesques.

The Court: Let me get this straight. In this period that you refer to, 1660 to 1850, there were two licensed [32] theatres in London?

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The Witness: Yes.

The Court: And I take it outside of London there was very little dramatic art produced?

The Witness: In the provinces they were generally served by the London theatres who went on tour in the summer.

The Court: The two theatres who went on tour?

The Witness: Yes.

The Court: These theatres competed, I suppose?

The Witness: They did.

The Court: In the history of that period is there any situation where one of the theatres would put on a serious play and the other theatre would then burlesque that same play?

The Witness: Yes. That is very true, and you can see that in the volumes of old John Genest, The Annals of the English Stage, down in 1832, how in the first turn of the century they have Covent Garden and Drury Lane. You see that competition in this. You see that our ancestors didn't go to see a play, they went for an evening's solid entertainment. They saw a curtain raiser, which was a farce, they saw hornpipe dancing, a slack wire artist, they then saw a comedy, they could see a burlesque, and then see a serious play, and then a pantomime after-piece, often. So that they went four or five hours at a stretch to the theatre. And it is in those [33] comic skits that you find this sort of burlesque. Allardyce Nicoll's History of The Early Nineteenth Century Drama tells about these things.

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The Court: I asked a question and there were two parts to it, and you said yes, and I don't know whether you said "Yes" to both parts. I asked whether the theatres competed, and you are now telling me that they competed.

The Witness: Yes.

The Court: These two theatres, were there occasions when one would run a burlesque of the other's serious play?

The Witness: I wish I could answer that directly. My feeling is yes, but I couldn't give you anything specific at this time. There was competition there in this——

The Court: Let me back up a minute. I don't mean did they take one character out of a play and take a shot or two at him, or did they take one situation, but were there situations where one of the theatres competing with the other would take the theme, the dramatic incidents, the sequence, practically the story, the same characters, and then put it on in a burlesque of the other theatre's serious play?

The Witness: Yes, and yet I can't give you a specific reference. You will find in Allardyce Nicoll they did this, because there was a great deal of keen competition. Say Hamlet was given in one theatre—that is not a good example. Take a more recent play, a play on the British Navy, one [34] theatre would have it, and they would give the sol-

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emn play; Covent Garden over here would have a burlesque on that.

I wish I could give you names and dates. I can't at the moment.

Q. (By Mr. Mitchell): You are talking about these ancient, or, rather, a long time ago, these two theatres, but while we are on this subject—and the court is particularly interested in this subject—while we are on this subject can you bring down to date, starting as early as you can, examples of where a competing theatre will be burlesquing a play being played by a theatre, a serious play by a theatre on another street?

A. Yes. Of course, after 1850 the theatres spring up everywhere and are all in active competition.

Q. They are in active competition, but what the court is particularly asking you is whether in engaging in this competition one theatre would play a burlesque of a serious play being done in another theatre, and he would like to have you answer that and give examples, I think, right down to now, starting as early as you can.

A. I would like to do that.

The Court: I will tell you why I am interested in it. Largely from the standpoint of knowing what kind of a background was presented to the early judges who first wrote and passed on these matters. In other words, cases aren't [35] decided in a vacuum. I have been trying to find some of the earlier cases on this matter. Those judges didn't write in

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a vacuum. They wrote knowing certain facts that then existed.

Mr. Mitchell: The reason for this witness is we are trying to bring these facts to your attention, your Honor.

The Court: I am interested in this solely from the standpoint of being better able to understand what the judges were talking about.

The Witness: Yes. You take about 1805, one of the theatres discovered a child actor who was eleven years old, Master Beattie, and he played Macbeth to one of the eighteenth century tragedy queens who lived over in this age, whereas the other theatre immediately brought out Miss Clara Mara, age five, who played Lady Macbeth, but the Macbeth they used here was Stephen Campbell, who was so fat that he boasted he could play Falstaff without padding, and the whole attempt there was clearly to make fun of this other child actor.

The thing soon ran itself to earth. Covent Garden imported a troop of trained horses which appeared, and every play written for Covent Garden had to involve the evolution of a trained troop of horses. Drury Lane then imported a troop of elephants and each side made fun of the other in this.

Q. (By Mr. Mitchell): What I particularly would like to have you do for the court, if you will, is give us examples [36] of plays, serious plays, that while they were playing on one street were burlesqued in a theatre on another street, if you have such examples.

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A. May I go through it this way first, and then come back to it? Some of these I think will emerge.

The Court: The reporter has been pretty busy. We will take a short recess.

(A recess was taken.)

Q. (By Mr. Mitchell): Again, Dr. Baxter, what we would like to have you do now in connection with this history of burlesque that you are giving us is to give us some examples of burlesques of plays where the story line or the incidents in the play, in the serious play, are burlesqued by some rival theatre, and then we can go from there to where burlesques of stories or novels are used as a take-off point for burlesques of rival authors who use those as a basis of burlesque, but let's start first with the plays.

A. I am sorry to seem so obtuse. From Victor Hugo's Hunchback of Notre Dame you get Quasimodo, The Deformed, or The Man With The Hump, a burlesque at one of the minor theatres. Another one, Miss Esmeralda or The Maid and The Monkey——

Mr. Selvin: Can we have the dates of these as we go along?

The Witness: I haven't them specifically. [37]

The Court: Give us the century.

The Witness: This is all the nineteenth century.

The Court: The 1800s?

The Witness: 1800s.

The Court: After 1850?

The Witness: Yes. The proliferation of the

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theatre made possible the many theatres in competition and you get this sort of burlesque. While Monte Cristo was running, you will have a burlesque running called Monte Cristo, Jr.

The Court: Let's stop just a minute. You mentioned two or three burlesques of the Hunchback of Notre Dame. Were those burlesques burlesques that used the same characters, the same sequence of events, the same dramatic climax, the same finale and so forth?

The Witness: Those that survived show a lot, and Allardyce Nicoll lists them, show a very close parallel.

The Court: Who lists them?

The Witness: Allardyce Nicoll.

The Court: In what book?

The Witness: Allardyce Nicoll, two volumes, The History of Nineteenth Century Drama.

By the very nature of these things they are ephemeral and don't get into print, so we can only generalize from what have come down to us.

But like all burlesques, they tie in recognizably to the [38] drift of the play they burlesque. Often the characters are given names which are punning variations on the name of the original. You can see that in some of these titles. You get The Three Musket Dears; or The Gay Musketeers, or All For Number One, which is certainly a burlesque transposition.

Trilby toward the end of the century, further along, had a tremendous vogue, and had one of the

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longest runs in the theatre, DuMaurier's Trilby. And while it was running you have A Model Trilby, or A Day or Two After DuMaurier, which is one of those Victorian puns. A Model Trilby. She was a model, you will remember. And you get one called Thrilby, which is clearly a burlesque transposition of the other.

Stevenson's macabre story, which has been referred to today, The Strange Case of Doctor Jekyl and Mr. Hyde, pops up in the nineties at one of the minor theatres as The Strange Case of A Hyde and Seekyll.

The Court: Now, let's take that. Is a script available of that burlesque?

The Witness: No. All we know is what historians tell us about it.

The Court: Outside of the name was there the same plot, namely, the one character who had the two parts to his make-up?

The Witness: I can't say specifically about that, but [39] the presumption is so, because that is the way it burlesques. Where we have the scripts it is clear, that you take the thing and you take-off from it. You identify your burlesque with the thing burlesqued in such a way that we feel instead of the heroine turning to the right, she is going to turn to the left, but the incident over here (indicating) is behind the incident in the burlesque.

As I say, these things are ephemeral and often all we know are titles and what the scholars of the theatre have been able to dig out of contemporary

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reviews, actors' memoirs, and things of that sort. When we get closer to ourselves we can see some of it.

I think one of the most popular plays ever written in England was The Lady of Lyons. This was never off the English stage very long between 1838 and the end of the last century. It was as popular in Philadelphia and in the gold rush towns of the Mother Lode in California as it was in London or the English provinces. It was an exciting play, it was interesting. It was admired, and of course it was burlesqued endlessly. Here are some of the burlesque titles: The Lady of Lyons Married and Claude Unsettled; The Lady of Lions, or Clod—instead of Claude—The Bellows Mender; The Lady of Lyons, or, Twopenny Pride and Pennytence; Ye Ladye of Lyons.

I found the dates of five other burlesques of this stock [40] play before 1879.

Bulwer-Lytton's Richelieu was burlesqued; Ion of Talfourd was burlesqued many times; Ivanhoe, the dramatic version of Scott's Ivanhoe was burlesqued through the nineteenth century.

Q. When you say "burlesqued," the court is interested in knowing—when you come to a point, tell us whether the burlesques used incidents, characters, and story line from the original.

A. Such a thing as Henry Irving's success in The Bells is followed by The Bells Bellesqued. These Victorian puns are incredible. And there you

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do have the central character going through the various events and the burlesques follow this.

The Dancing Girl of Henry Arthur Jones became The Can't Sing Girl. This is Victorian. Ingomar, The Barbarian appeared in 1851. While it is running, at a neighboring theatre there is something called Ingomar, The Idiotic, which can only be a burlesque, and is so catalogued.

Another famous play of the nineteenth century was The Corsican Brothers—the Pasadena Playhouse played it recently—by an Irishman named Dion Boucicault. Immediately there appears at a neighboring theatre The Corkonian Brothers. You get the natives of Cork, and now you see the events take place with an Irish brogue. He himself wrote Irish plays, [41] Boucicault. He wrote The Colleen Bawn, which remained on the English and American stage down to World War I. You get a burlesque of that called The Cooleen Dawn. Arrah-na-Pogue becomes Arrah-no-Brogue.

These things are all through the eighteenth century.

Ibsen himself wrote a burlesque of one of his plays, but the English stage burlesqued him, Ibsen's Ghost. And James M. Barrie began his literary career by writing a burlesque of Ibsen.

One very interesting case in point is Tennyson's The Princess. And here we have the thing very clearly seen. W. S. Gilbert takes it and calls it a respectful perversion, but he transposes the story to a comic key from one end to the other, and it

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is Princess Ida, one of the famous Gilbert and Sullivan operettas.

Q. There is an available script or description of that?

A. Yes. Many of these things exist, most of them exist, if they exist at all, only in the Licensor's office in London.

The Court: Have you inspected The Princess by Tennyson and Gilbert's Princess Ida?

The Witness: Yes.

The Court: Is the sequence of events the same?

The Witness: It isn't complete, it doesn't follow completely the whole chain, but enough. That is the way [42] of burlesque. It ties in this event and another and is recognizable from the original, because it has enough points in common. It doesn't follow the whole thing right through. I know of no burlesque right through which follows every point in the development of a work.

The Court: Of course if you had a copy that followed the other point by point to start with, you would have a Chinese copy. Now, if you had a copy that went through point by point, and therefore it would be obviously of equal length, but that merely converted the serious to the humorous, would you call that a burlesque?

The Witness: No, because as I would like to say a little later, burlesque tends to be short. The comic cannot be too much sustained. The critical laughter of burlesque selects, it is a selective art; it takes this, that and the other. Of course, without

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its original it couldn't exist at all. It is an ancillary thing, it is a secondary thing, in that it must follow the original.

The Court: These questions don't indicate how I am going to decide this case. I am just testing out various thoughts that go through my mind.

Supposing that there had been written a play that took the customary length of time for a play or motion picture, in a serious vein, and then someone took that play and cut it down, say, to a 15-minute television serious play, which would [43] mean that they would have to take the same general characters, they would have to take the plot and the climax, but they would have to leave out a lot of the filling material, but actually they cut it down and made a 15-minute short out of the long, serious play, the result would be that they had taken the heart, the guts of the play, and put it into the short 15-minute deal. Now, supposing a 15-minute burlesque was made which was based on this 15-minute serious item, namely, the burlesque had the heart, the substance, the sequence, the climax, the characters, boiled down: would you consider that a burlesque of the original serious play?

The Witness: The transposition of the topsy-turvydom to another effect is important here. When you burlesque something it is obvious you can have many approaches. You can just take the plot line, the development of incidents, and follow that. But from the point of view of a student of literature,

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I think those are the less important things in a work of art.

If I might mention Gas Light, it is very clear that the virtues of that play are not in plot particularly, but in the atmosphere, the tremendous atmosphere, the rich characterizations, the theme, the growing suspense.

Now, the burlesquer who looked at such a play back in the nineteenth century would not take the rich characterization over, he wouldn't take the growing psychological montage [44] of suspense; what he would do would be to take the events in order to string his nonsensical perversion on it.

It is a little complicated. You are dealing here with tone, sometimes with poetry. It seems to me that you could make a very good case for Gas Light as being a sort of poem. It moves you in just that way.

Now, in any serious play—and Shakespeare of course has been more burlesqued than anyone else on the English and American stage—when you take King Lear or Othello, you don't deal with it on its own terms. To give a 15-minute boiled-down version of The Tempest or King Lear in a serious way would of course not constitute burlesque. To select here, there, points from that, here, there, characters, not taking them in their own terms, but carrying them out in the comic, caricature, is the way of burlesque. Burlesque doesn't take characters out and put them over here (indicating). I don't think so. What it does is take the idea and then make

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a new character which is a monstrous joke on the other one. That is the way it has always been in burlesque.

The Court: Go ahead.

Q. (By Mr. Mitchell): Now, you were going ahead with some examples where you knew something of the story line and incidents in the burlesque as compared with the story line and incidents in the original which is being burlesqued.

A. You have a whole, rich history of English parody [45] where people in their own lifetimes having written books suddenly find their work parodied. You find that at the beginning of the nineteenth century. Rejected Addresses, which was a series of hilarious suggested addresses for the reopening of a theatre that had burned down, Drury Lane.

Q. What I would like to do is to stick to story line and incidents, Dr. Baxter, for the present.

A. All right. Let's take these books, if I may. This book was a best seller in 1929.

Q. What is the name of that book?

A. Joan Lowell's The Cradle of The Deep. You will perceive its end papers here which show maps. This one is a story put out by this girl published by a reputable publisher in 1929, which tells how she was brought up at sea on a sailing ship. It is full of the most amazing events.

Q. Serious?

A. It is a serious book, yes, though its authenticity has long since been questioned, although it

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was launched as a book of a girl's growing up at sea. It was either then autobiography or fiction. But it was a serious book. It was a best seller and had many reprintings in its first year.

Simultaneously with its vogue comes this book called Salt Water Taffy. And, again, the very end papers are eloquent here. This is a story of a girl who is raised at sea. Chapter by chapter, book No. 1, the original, is followed [46] in this mocking burlesque. The burlesque is by Corey Ford, who at one time wrote a tremendous lot of stuff for American magazines, and so forth. You have a chapter in here where she learns about sex from dissecting a shark that has been hauled aboard.

Q. Is that in the original?

A. Yes. "We catch a female shark and I learn about women from her," the chapter is called.

Corey Ford has a chapter in which the shark most amazingly reveals not only the facts of life, but a lot else. They find the remains of two sailors they lost days before.

In the original book she walks in the dance of village virgins. In Corey Ford's book she decides to join the virgins as a retroactive virgin. And the whole thing is transposed into this sort of nonsensical key, and here they are on the book stands at the same time, and both by publishing houses in the United States.

The Court: Just interjecting, of course the study you make of the matter from the standpoint of the literature is entirely different from the thing that

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I have to decide. Whether Corey Ford could rightfully do that is an entirely different question from whether he did it. Joan Lowell may have welcomed this parody. It might have furthered the sale of her book. We don't know. But getting up to the present, I am inclined to think that the fact that other parodies were [47] made or other burlesques were played has no bearing on the legal issue.

I am interested in what went on in certain periods from the standpoint, particularly the early periods before 1850 and after 1850, as a background for knowing what the judges were thinking about in deciding some of these cases.

Mr. Mitchell: Let me suggest to your Honor, this is not the time to argue it, but we pointed out in our opening memorandum, and when we file a further memorandum, as I think it is our purpose to do if your Honor will permit it, both sides I think want to file something in reply, we have pointed out and we want to further point out that I think this is material on the basis of custom, that is, that it is fair use, one test is whether it has customarily been done. And in addition to the reasons which are impressing your Honor, I think the literary history which we desire to give you will be some indication of what in literature has been a custom over a period of a very long time. Now, that doesn't make it necessarily fair use, but that is one element of fair use.

The Court: I will have to think about that matter of custom. It has also been customary to steal

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from the other man from the beginning of time, if you want to talk about customs. Kipling at the end of his volume of verse has that final verse about:

"When Homer smote his bloomin' lyre
He'd heard men sing on land and sea,
And what he thought he might require
He went and took the same as me."

So custom would work both ways.

I am not going to pass on that. I have this thought in mind, that where a case is tried without a jury the admission of evidence that is not competent is not error, because the Circuit Court will indulge in a very generous presumption that the trial court separated the wheat from the chaff, and I may let it all go in upon the theory that no harm can be done, and it will be then available on appeal.

Mr. Mitchell: We would like to go ahead with it, because even though as you say there may be a custom to do some stealing, yet unless this custom can be upheld the form of burlesque which has been customary will thereupon become obsolete, will become prohibited.

I am not asking your Honor to decide that question now, nor do I think this is the time to argue that question, but I think the background should be here, and in the light of that background you can then decide it one way or the other.

The Court: All right.

Q. (By Mr. Mitchell): Can you go on with some more examples of plays? We are back in the 1800s now. We can come into the 1900s with plays,

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where you can recognize, [49] between the serious play and the burlesque of it, a connection in terms of story line, or characters or incidents.

A. I would like to note that progressively after 1900 there appeared a new form of theatrical burlesque in what might be called the brief potted burlesque, and you meet it year after year in the Follies, Ziegfeld Follies, you meet it in George White Scandals, in The Passing Show, The Passing Show of 1912 took the incidents of Paid in Full, a contemporary success in the Broadway theatre, and made fun of it. Trixie Friganza was in that. These things still go on.

One of the basic inevitabilities in a modern revue is some book or play or contemporary story will be treated in this burlesque way.

We remember the Little Show, Weber and Fields and Fay Templeton and William Collier, and so on, year after year had as a policy—this is what the reminiscences of Weber and Fields reveal:

"We had a regular book that was legitimate burlesque of some New York hit such as 'The Christian,' 'Heart of Maryland,' or 'The Messenger Boys From Mars.'"

In the history of the New York stage we see burlesques given in the first part of this century of Arizona, Barbara Frietchie, Bohemian Girl, Camille.

By the way, grand opera from the very beginning was [50] burlesqued in which they did most rowdy things with events and the people of the original.

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but it has always been fair game as Shakespeare has, as Cervantes has, as the very greatest of things always have. Cyrano was burlesqued, East Lynne.

Q. When you say they were burlesqued, what do you mean by them in terms of these Weber and Fields shows you are talking about?

A. Slapstick version.

Q. In which the incidents and story line are used in the story?

A. Yes, sir. You have Madam X, Paid in Full. I found burlesques of all these things, which identifiable with the original, the burlesque makes fun of the situation and the people and the theme. Paid in Full; Anna Christie, Three Weeks, Pollyanna, The Girl of The Limberlost, The Sheik, Lightnin', What Price Glory, The Front Page, The Green Hat, The Constant Nymph, Tobacco Road, many burlesques of that, Abie's Irish Rose, Winterset, The Hairy Ape, Gone With The Wind, South Pacific.

The Court: In that connection, in your investigation of course you had no way to ascertain whether or not there was permission?

The Witness: No, I have no knowledge of that.

The Court: We can probably guess or assume that in a certain number of cases there was no permission. Certainly [51] in cases where the author would be dead.

The Witness: Of course from the purely literary —I realize my ineptitude here to face the legal

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issue. All I can say is men have always laughed at each other, and it is a form of recognition that good things are laughed at, the cheap, the tawdry, the inconsequential get satired. If it gets any treatment at all it gets the corrosive, destroying treatment of satire. But you get Shakespeare and Cervantes and Homer and Virgil, the most important things written, and they are burlesqued again and again and again with this sort of loving, fondling treatment. It isn't to destroy, as satire does. The poor things are. The important thing is among men of letters there is a feeling that to be burlesqued is to be noticed.

Dickens, for instance, learned that William Makepeace Thackeray was burlesquing in the London Punch contemporary novelists, and he watched week after week and there was no burlesque of him. He had had a little estrangement with Thackeray. So he let it be known he wanted Thackeray to know he would be happy to be burlesqued.

You will find the poet Campbell agonized that he wasn't burlesqued. You find Edwin Booth who was playing Hamlet in New York happy for the chance at a matinee when he didn't himself have to play to go over and see a comedian of the time burlesque Booth's way of playing Hamlet. [52]

I think it is to be noticed, it is a form of criticism. Now, often, again from the purely literary point of view, if a man must sanction those who burlesque him then surely he has the right to pick his critics, and that would be, it seems to me, the

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death of all forms of criticism, including this rather gentle and playful one called burlesque.

Q. (By Mr. Mitchell): In the history of literature is there any evidence that these numerous burlesques were done with the permission of the author of the original?

A. I know of no case. It may have been, of course, but I rather doubt it. These are independent arts.

Q. Are there some well-known authors who began their careers as authors of burlesque?

A. Yes. I mentioned Thackeray, the great novelist, who began writing amusing little burlesques. Jane Austen, a great novelist whose reputation today is higher than ever, began her career with a burlesque of a certain sort of novel popular in her time. Indeed, of one particular novel specifically.

Q. In that burlesque was the story line, and incidents, characters, used in the burlesque?

A. Yes. Northanger Abbey. Many other people began that way.

Q. With respect to these burlesque skits in The Passing Show and George White's Scandals, and Ziegfeld Follies that [53] you mentioned, did those burlesques use the story line and the incidents in the original?

A. Yes. For instance, you take Tobacco Road, I remember this in one of the reviews, I have forgotten which, your Honor, you have Tobacco Road; now Tobacco Road is a very sordid story of humble people, full of hookworm and poverty, and what

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you do when you burlesque it is put them in silk hats and have them on Park Avenue deploring the fact they have to live this wretched, denying, thwarting type of life, and then it becomes Tobacco Boulevard. I have some more.

Q. I would like to have you finish your examples, yes.

A. Benchley, Robert Benchley for many years criticized Broadway hits. He developed a technique, which he and other people have used, of burlesquing, say, a scene of one of those plays, but so treating it that in his burlesquing of it he called attention to what he thought were the weaknesses as well as the validities of the thing he criticized.

You can see that very beautifully at the time of Hemingway's novel Across the River and Under the Trees, which is a story of an Army officer who has had World War II behind him. He has fought all over Italy, now he has a bad heart, living on borrowed time, and in Venice for a short time he has a belated, wistful love affair with a young girl who to him is beauty and youth and all the things that somehow [54] eluded him, and it is a very philosophic play. The best review of that, I think, was a factual, almost parallel parody in the New Yorker by E. B. White, the famous paragrapher of the New Yorker, in which his old man thinks about things not quite the same things as the hero of the story. There is the girl, there is the atmosphere, there is the bad heart, and all of it, but it is transposed to this burlesque key.

(Testimony of Frank C. Baxter.)

Benchley did that, of course, a great deal. Newman Levy did it in reviewing operas in New York for many years in the old Life Magazine. Ring Lardner reviewed plays by parody. Certainly anyone who has followed the fortunes of the theatre in our time knows that he may find Jimmy Gleason or Henry Morgan or Bob and Ray or Sid Caesar or Imogene Coca, or any of these people popping up with some burlesque version of some reputable play, movie or whatever it is. Beatrice Lillie for many years appeared in various reviews, and still is appearing in reviews, in which she and her colleagues, Mr. Gardner and others, had fun with works of literary art of our time.

Your Honor, I have made certain points in summary about the history of burlesque. Might I be permitted to read them to you?

The Court: Yes.

The Witness: It seems to me a thoughtful study of the [55] history of the spirit of burlesque would lead a man to these conclusions:

First, that burlesque as a form of comic art is as old as literature. Even among primitive people who see it. As soon as institutions jell you get burlesques of them. And its traditions are cumulative and unbroken. There has been a long evolution to the burlesque as we know it today all through the history of literature. It has always been accepted and sanctioned as a separate form of literary art requiring a different sort of genius from the original creation, an established mode of laughing criti-

(Testimony of Frank C. Baxter.)

cism: Henry Fielding, Jane Austen, Thackeray began by writing this. Almost all great writers,—I would defend this against any one of my age and weight in generalization—almost all great writers somewhere in their career have written parody, satire, or burlesque.

Second, burlesque, it seems to me, cannot use bitterness or rancor. Burlesque is a happy thing. It exists to give fun; it doesn't try to reform anything, change anything, slay anything. I think satire does. Satire is purposive laughter. When Dorothy Parker reviews Katherine Hepburn in The Circle, "Miss Hepburn ran the gamut of emotions from A to B," that is murderous. Burlesque doesn't do that. It hasn't bitterness. It seems to me the tone of the particular thing under discussion is the test. Is it fun? [56] Is it intended to be fun? If it is harsh or deeply critical, I don't think it is burlesque.

Satire, as someone said, is brimstone; burlesque is wine. It is merely spoofing, and the tone of it is the test.

Third. Burlesque is rarely personal. It doesn't attack individuals, but rather modes, styles, forms, tendencies, or focuses upon one work.

Now, the question has been raised here about story line. As a student of literature and some humble critic of it, I think some important works of literature are rarely the stories. There are only a few stories in the world. In Othello we have Iago progressively driving a fellow mad by one thing

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after another until the heap of it is preponderant. In the Duchess of Malfy, the play by John Webster, you have two brothers driving a sister crazy. Plot is not important. Shakespeare took all of his plots, borrowed them, swiped them, all except one, and the critics always say the source of Love's Labour's Lost has not yet been discovered.

It is what they do with these plays. You can make a fortune by rewriting Cinderella in modern terms.

So I think burlesque likes to look at style, it likes to look at characterization, at the poetry, at the theme of a work of art. [57]

Then, four. Burlesque is rarely of a whole work of art. It is short, shorter than other things. It is never a substitute for the original, but a transposition of the original into quite a different key. Invariably much shorter. It concerns itself with parts, parts which it borrows because it is burlesquing, B is burlesquing A, and there are enough things borrowed to tie in the burlesque with the original.

Another thing burlesque does is it stuffs and adds things which are outrageously far-fetched and brings them into its burlesque. If you are burlesquing Ivanhoe, Ivanhoe may stop half way through and shave with a safety razor. You bring in absurdities from without. So most burlesques of which I know anything are funny, often not because of what is borrowed but what is brought in. And in sheer time in such a thing most of the time goes to the stuffing, there is where the fun is; the

(Testimony of Frank C. Baxter.)

other is just a sort of excuse for playing with an idea, playing with a theme.

Five. Burlesque changes the tone of the original; it turns the serious into the comic, and the comic into the serious. It uses all the comic tricks of exaggeration, grotesquery, topsy-turvy. As in Tobacco Road, poor Jeeter Lester becomes the father of some marriageable daughters on Park Avenue. It loves to confuse the high and the low. Always a different tone, different thing entirely. [58]

Six. It rarely bothers itself with the evil or the sham, the ignominious and the failure. You don't burlesque a failure. It turns toward the popular and the successful, historically. Satire is the tool by which men level the failures into dust.

Seven. Burlesque is a sort of compliment. Monk Lewis was a famous writer, novelist, at the end of the eighteenth century, who burlesqued himself anonymously. Swinburne burlesqued himself, the poet Swinburne.

It is interesting as a student of the comic, I can say this without fear of doubt, that it is the most respected things of literature that have been most thoroughgoingly and habitually burlesqued.

Then here is a very interesting point, your Honor, I think, about burlesque, because it is a manifestation of the comic spirit: It loves to look upon anything different, fresh, and strange. Burlesque as a manifestation of the comic spirit is one way in which society tests the validity of the new.

George Meredith said the comic spirit is like a

(Testimony of Frank C. Baxter.)

great bird, beady-eyed and alert, hovering over society at all times ready to penalize any divergence, and it is always on the alert. And burlesque is part of that comic spirit. It laughs at things that are new, the things that may be tomorrow's gospel, but it laughs at them and tests them with [59] this touchstone of laughter.

Can things stand being laughed at? The church has been laughed at. The law has been laughed at. Medicine has been laughed at. My profession is a common target for the smallest boy. What hasn't been? And that is one very basic human thing, that men will laugh at what seems strange and new to them.

Nine. Burlesque historically has flourished in those societies where there has been most democratic liberty.

Ten. If burlesque is pornographic, coarse, vulgar, scurrilous, or addressed to the deformities and personal misfortunes of individuals, it is not burlesque. Burlesque is a happy toying with serious things. If, in history, it seeks to touch corrosively upon a personality, it doesn't come down to us; it dies, it is not successful.

Then this very interesting thing I would like to say.

Eleven. Through the long millennia of western civilization the stage has always laughed at itself. The stage has always laughed at itself, whether it is in the minstrels of the nineteenth century, the revues of the twentieth. The stage has a lively

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interest in the stage, and has always done that, and that goes back to the Greeks, back through the Elizabethan and the great age of English drama to the ancient Greeks.

Twelve. There have been very few important novels, [60] verses, or plays in the history of literature, not only English and American, but world literature, there have been very few important novels, verses, or plays that have not been burlesqued in their own time.

These generalizations one can document at length. I believe them here as a witness to be quite true.

Q. (By Mr. Mitchell): Dr. Baxter, from the standpoint of a student of literature, what are the literary values of the play or motion picture Gas Light?

Mr. Selvin: I object to that upon the ground that it is immaterial and not an issue in this case.

The Court: It is a preliminary question for what purpose?

Mr. Mitchell: The purpose of showing your Honor that the literary values of Gas Light are not used in the burlesque, but rather things are taken from Gas Light which do not constitute literary value, and the burlesque creates for itself a literary value out of things that don't come from Gas Light. I think that should be one test of the validity and propriety of burlesque, whether you take the real values.

The Court: I won't let him go so far as to testify which values were or were not taken, but I

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will overrule the objection and he may state what he considers to be the literary values of Gas Light.

Mr. Mitchell: The motion picture or play.

The Witness: Well, from the very first moment I think you sense the atmosphere, the dark, rather dingy Victorian, heavy architecture, the clop-clop of the horses, the weeping girl, and all that. It seems to me atmosphere is tremendous here. I can't imagine this being quite as effective if it were laid in Iowa, or anywhere else. But you get somehow a way of life, an atmosphere of that time. Then you get in another sense atmosphere of suspense. From the very beginning you sense somehow this girl is doomed. You feel that it is going to work against her.

I was tremendously conscious of that, of the growing suspense, and of this thoroughly and completely realized atmosphere of a bygone time. These two things.

Then, I think the characters. I think the girl who is after all simple and naive and finds herself faced by this tremendous horror she can't quite localize, she doesn't dare find it herself, her character is perfectly clear. Even the servants emerge clearly, slight as they are in the action. Then the husband is of course fascinating, this man.

It seems to me it is the atmosphere, the suspense, the characterization.

Then I think in our day we are tremendously interested in the individual, and more than men have ever been in [62] literature, we know that no

(Testimony of Frank C. Baxter.)

drama is important unless it is the drama of man against things, the things that press upon him. And in this you find this girl is alone. What will save her? You identify yourself with her. I think the literary virtues are in these things, Mr. Mitchell.

Q. (By Mr. Mitchell): What in your opinion, Dr. Baxter, are the literary values of the burlesque, the Benny burlesque?

A. Certainly they are quite different. I don't believe for a minute in any of the characters. They seem to me gross perversions. They live in the comic world where people can get away with things. I don't believe the lady is under great stress; that she can't have her dinner in bed, because she has had her other meals in bed, and the bed is filled with dishes. That is pure burlesque. The fact that at the most inappropriate minute a girl comes in tumbling or the plaster falls, or in this topsy-turvy world the butler walks upside down. Don't you see?

Freud I think explains a great deal of our modern laughter. He said among other things about laughter, we are all so put upon by laws and rules and regimentations and so on, and it is growing as society fills up, that in the comic we celebrate the person who is free. He lives in a sort of pure stream of consciousness, the comic character, he gets away with things.

Now, the tensenesses of Gas Light over here were most [63] moving, disturbing. But in this madcap thing nobody is responsible for anything, and you

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happily identify yourself with these free people who do the most outrageous things. And if the butler comes in upside down, you accept that as a way of life in this never-never land.

I think it is fun, and it has that sort of comic escape from reality that we seek in our day. Thurber, Perelman, Ogden Nash, the three most important figures now writing comedy in America, are all people that say, "Come with me into a mad world where no values hold, where you won't be oppressed." And that is what this has. It is a typical bit of middle nineteenth century humor in this: that it lets you into the world free.

That is a very desirable thing, because we can't live by tension.

Q. You spoke once, I believe——

The Court: How much longer will your direct take?

Mr. Mitchell: It won't be much longer, but since he is going to come back anyway, if you would like to break now, very well. Whatever you want to do.

The Court: I suppose the Irish wake is an example, also, of this release from tension?

The Witness: I think so, oh, yes, oh, yes.

The Court: Not being a student of literature, but being an Irishman, I understand that a little better. [64]

We will take an adjournment until 2:00 o'clock.

(Whereupon at 12:15 o'clock p.m. a recess was taken until 2:00 o'clock p.m. of the same day.) [65]

The Court: Proceed.

FRANK C. BAXTER

called as a witness by and on behalf of the defendants, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Mitchell): In your testimony this morning, Doctor Baxter, you used the phrase, in connection with burlesque, of taking off the original. What did you mean by that?

A. Mr. Mitchell, I think that is a very excellent synonym for burlesque, take-off from something. It does not parallel in the sense that it just recreates the thing in a new tone, but it takes off from it, selectively, this element, this element, this element, in order to identify this is a burlesque that B is making of A, but it takes off into the blue with all sorts of things. It introduces extraneous materials: it takes one little detail and puffs it up beyond its significance in the original. It leaves out much, but it constantly comes back, so to speak, to refresh itself to the original, and then takes off again. But in no sense [66] parallels the original.

Mr. Mitchell: I think those are all the questions I have, your Honor.

Cross Examination

Q. (By Mr. Selvin): Dr. Baxter, your television program is the one that is known as Shakespeare on TV? A. Yes.

(Testimony of Frank C. Baxter.)

Q. That is a Columbia Broadcasting System program? A. Yes.

Q. Which began about four months ago?

A. Yes. The protocol began about a year ago, however.

Q. But so far as actual telecasting was concerned it began about four months ago?

A. Yes, in the late summer.

Q. And has, if I heard correctly, last Saturday been renewed for another period of time or semester? A. Yes.

Q. That program has never been directly advertised, has it? By that I mean newspaper ads or twenty-four sheets, or billboards, things of that sort?

A. No. Some Christmas readings I did, however, were advertised. [67]

Q. I understand, but those came just recently?

A. That's right.

Q. The program has, as you indicated, exceeded your expectations. I think you meant by that that the size of your listening audience or viewing audience is larger than you thought it would be?

A. Yes.

Q. It has become, in fact, a quite popular program, hasn't it? A. I hope so, yes.

Q. Don't you agree with me that to a considerable extent that has been due to word of mouth advertising of the interest and merits and quality of the program? A. Yes, I think so.

Q. That is a serious program, serious in the

(Testimony of Frank C. Baxter.)

sense that it deals with the subject of Shakespeare or Elizabethan literature? A. Yes.

Q. From a learned point of view?

A. Yes. But of course calculated to a popular audience.

Q. And calculated for an audience of the sort that in part, at least, might be listening to the program for the sake of the college credit that can be attained from it? A. Yes. [68]

Q. So it is aimed at the type of education and intellectual status, let us say, that you would expect to find in your average university English class?

A. Yes. Not altogether so, of course. This is a one-unit experience, one hour a week, and hence it has to be rather popular in its appeal. It opens more doors than it closes.

The Court: What is its name?

The Witness: Shakespeare on TV.

Q. (By Mr. Selvin): Leaving aside the occasional flashes or snatches of humor or levity, however, it is intended to be a serious discussion of literature, and particularly the literature, English literature as exemplified by Shakespeare?

A. Yes, I think so.

Q. And of course in order that the program might have its fullest effect on its listening or viewing audience it is essential, is it not, that it be received with the same seriousness of attitude?

A. Yes, to such degree as it is serious. Serious is a rather portentous word here. Certainly it isn't solemness.

(Testimony of Frank C. Baxter.)

The Court: It is not a comic program?

The Witness: No, that is right.

Q. (By Mr. Selvin): The art of parody or burlesque—let me rephrase that. Let me say that the custom of or practice of burlesquing or parodying serious works over [69] the ages is not one that has gone unchallenged, is it?

A. Do you mean legally challenged?

Q. No. I mean——

A. One thinks of Dr. Johnson in the eighteenth century refusing to let Foote burlesque him, but that was the personal sort of thing which I cannot feel to be the province of burlesque.

Q. Hasn't there in each period during which burlesque has flourished, hasn't there been a body of opinion among literary men in opposition to the practice of burlesquing serious works?

A. Never an organized opposition. If I may expand that a little bit, I would like to say this: that the philosophers of the comic agree on very few things. One thing is this, that wherever men are deeply and emotionally concerned they don't laugh. When people are deeply and emotionally concerned. And there are people, of course, whom the gods have created incapable of laughing at anything. And at every age I grant you there are rather solemn and portentous people that don't like laughter. But as for an organized school in any age, I don't know of any such thing.

Q. Whether there has been an organized school or an organization or body that has been opposed

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to the practice of parody or burlesque as such, have there not in each age been, let's say, prominent or eminent individuals in the [70] literary field who have opposed the practice of burlesquing or parodying serious works as a matter of principle, not as a matter of law?

A. No, I am sorry, I don't know of any such.

Q. Have you ever heard of Voltaire's opposition to parody or burlesquing of works?

A. Yes, you are very right, Voltaire did object.

Q. Or Lamont?

A. Lamont I don't know of.

Q. Or Wordsworth?

A. Again Wordsworth, you have to understand him, that he was a desperate man fighting desperately, emotionally concerned with everything, and hence did not—he was not a very good laugher, and he is one of the men, of course, that, alas,—to whom burlesque turns inevitably. But he represents a minority.

Q. How about Arnold?

A. Again, Arnold was somewhat a solemn, dogmatic, pontificating man who laughed with that unfortunate sort of laugh that can be turned on and off like a spigot. There were many things that weren't funny to him. These were exceptions to the very great tide of laughter.

Q. Browaing?

A. Browning accepted some of the laughter. I grant you that some of things he found annoying,

(Testimony of Frank C. Baxter.)

but he enjoyed, [71] for instance, Swinburne's parody of everyone else.

Q. Was that one in which Swinburne parodied himself?

A. Yes, yes; and Swinburne parodied seven different people, including Browning. Browning, I grant you, didn't like that, but he rather liked the others.

Q. Have you ever read directly or indirectly of H. M. Paul's opposition to the custom of parodying or burlesquing serious works? A. No.

Q. Or that of J. C. Squire?

A. J. C. Squire wrote at least four volumes of parodies himself and was a famous parodist. I can't imagine anything but an essay in paradox from him on this point. I knew Sir John Squire and he was a parodist on the London Punch for many long years.

Q. These gentlemen whom you disposed of as being not of the laughing sort, did their aversion to laughter extend to comedy or humor which was not of the burlesque or parody type, also?

A. I don't think Wordsworth was ever a very good laugher. Voltaire, on the other hand, was a man of passion, and of course he would deplore burlesque but love satire, and of course his satires are among the most corrosive ever seen. Candide for instance strikes at the very roots of human existence, philosophic satire. [72]

Q. Regardless of the psychological impulses which may have driven these men, or men like them,

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to their opposition, was not one of their specific reasons for their opposition to parody or burlesque that it tends to minimize the value, and I am not speaking of commercial or economic value, the value of the original, to use the phrase that I picked up in one of the books on the subject, that it takes the bloom off the original?

A. I have no doubt that one might find in letters and memoirs and table talk such statements, but, however, it seems to me you must test this against the larger human experience. I, for instance, could see the film Gas Light in ten minutes and be utterly wrapped up in it. I cannot feel that the bloom has been taken off, because some mountebank has made fun of it.

Q. That of course is a purely subjective reaction? A. Yes, sir.

Q. Do you think it at all possible that someone who saw the Benny burlesque of Gas Light version might not be affected by the ludicrousness of that burlesque in his attempt to view Gas Light seriously?

A. I myself in my experience with the comic find these things often whet curiosity to drive people to the original. It seems to me that it is so different in tone, so utterly remote from the concerns of Gas Light as really to have very [73] little to do with it.

Q. There is such a thing, is there not, Doctor, that the psychologists speak of as an association of ideas? A. Yes, indeed.

(Testimony of Frank C. Baxter.)

Q. Is it not conceivable that in the course of viewing a serious portion of, say, Gas Light, or, say, any other serious work, that the memory of a ludicrous burlesque of that particular part might come to the viewer, thereby spoiling his reception of the serious work?

A. I concede that intellectually it might be so. I guess there is no one in this room who has seen as many burlesques of Hamlet as I have, it is my business, and yet soon I shall begin reading Hamlet for about the thousandth time, and all that will fall away. That is out here in the realm of escape.

The Court: Let me ask a question. May I interrupt, Mr. Selvin?

Mr. Selvin: Yes, surely.

The Court: I don't know whether it adds anything, but have you made any study at all of the composition of the TV audience?

The Witness: Good heavens yes. Only in a random way, in that we have had ten thousand letters now.

The Court: I mean the make-up, a cross-section of the TV audience; for example, what percentage of the TV audience [74] could watch a TV show with a background and training and experience comparable to yours? It would be very small, would it not?

The Witness: I would think so, because I have worked very long at this, that is true.

The Court: Probably one per cent?

The Witness: Perhaps so.

(Testimony of Frank C. Baxter.)

The Court: All right.

The Witness: Though, of course, it might be argued, sir, in my case being interested in the theory of these things I should make stronger cross-associations than another man who would if there is association of ideas there, also, because of his belief in the compartmentalization of ideas, what you do over here laughing need not spoil what you do over here when you are serious. It is true escape is a reality in literature.

Q. (By Mr. Selvin): Hasn't it been true in the history of criticism generally, not simply criticism by way of parody or burlesque, but hasn't it been true generally in the history of criticism that one of the most effective weapons is that of ridicule, in other words, making people laugh about something that others are presenting as serious?

A. Yes, I think that is very true, to make them laugh about something. Burlesque, however, doesn't do it that way. It doesn't say, "Look here at this weakness, look at [75] this absurdity." That is the realm of ridicule by which we mean something very like satire, the calling forth of the laughable in this. But it seems to me burlesque is a take-off, it gets away from the original. This is its reason for being the original, it gets out here and creates something quite new. I think the fun in Auto Light is quite independent of anything in that which it is ostensibly burlesquing.

Q. You think, then, that there would be no serious risk that a viewer of Gas Light, for instance,

(Testimony of Frank C. Baxter.)

in the scene where in the carrying out of his plot the principal character calls upon the servants to swear that they have not been responsible for the disappearance of the pictures, that in viewing that scene the appreciation of that scene for a serious viewer might not be spoiled by a recollection of the ludicrous situation of a butler coming in on his hands, walking in on his hands carrying a tray of drinks during the course of it?

A. I can't speak for the generality of mankind, but it seems to me that we do, curiously, compartmentalize these things. As I say, I can see another burlesque of Hamlet tomorrow, and see Hamlet the next day, and while I might for a flickering moment be reminded of that I can't conceive that for myself it would be spoiled.

Q. Have you made any special studies or investigations [76] in preparation for your testimony today?

A. For many years I have had a course in the history——

Q. No, I don't mean your general background, which I think is in the record, but have you made any special research or investigation for the purpose of collating the material which you were to use in your testimony?

A. Yes, I tried to look over the field and read everything available.

Q. Can you tell me what you read in that connection?

A. Yes, I went through the standard histories of

(Testimony of Frank C. Baxter.)

English drama, I looked at old John Genest, 1832, ten volumes; I looked at Walker's history of English satire and satirists; I looked at these books that I know very well, anyway, Kitchin's Burlesque and Parody in English Literature; I went back and read Bret Harte; I looked up the complete volume of parodies and burlesques of Sherlock Holmes; I have read miscellaneously but following all the leads that opened up.

Q. In the course of your reading of Kitchin did you also read the introduction?

A. Yes, sir.

Q. That, incidentally, is Kitchin, A Survey of Burlesque and Parody in English, published in 1931 by Oliver & Boyd of London, Edinburgh and London? A. Yes. [77]

Q. And the Kitchin is George Kitchin who is lecturer in English at the University of Edinburgh?

A. Yes.

Q. And holds master's and doctor's degrees from Edinburgh, and baccalaureus from Oxford?

A. Yes.

Q. Do you recall in the course of that introduction, page 17, that is xvii——

A. No, I do not.

Q. ——Kitchin saying the following quote, and then quote within a quote: " 'Parody will only strike at what is degrading and false' said an eighteenth century authority on the subject, but everyone can remember cases where parody used with clever prejudice has really injured us for the enjoyment of

(Testimony of Frank C. Baxter.)

good work. This matter has been closely argued at various times both here and in France." Then he goes on on that theme. Would you say that is a fair statement on the situation?

A. I feel he is using parody—remember, this man is not dealing with a great deal of burlesque and parody, he rules out all the drama, for instance, and he is looking—and he has a warp this way in that he is interested in the eighteenth century sort of satire; he is looking at that satire which seeks to slay, the school of Pope, the malignant little men, the twisted Byron, and he is concerned with that sort [78] of thing much more than he is with this freer and happier burlesque that you meet otherwise.

I grant you that when Dorothy Parker says what she says about Katherine Hepburn, you never think of Katherine Hepburn but what you think of this other. That is a malignancy. That is the sort of thing I don't meet in burlesque. Certainly no focus in Auto Light that would say, here he is making this man squirm or making cheap and degrading this nobility.

My point is this book studies satire primarily, and he is interested in that. That is what I can't see in the pure burlesque such as Auto Light.

Q. I am not going to devote very much time to it, because it is largely collateral, I assume, but simply to complete the record as to whether he studied satire or burlesque, and as to how far he goes, his table of contents indicates:

(Testimony of Frank C. Baxter.)

Chapter I, Medieval Burlesque;

Chapter II, Elizabethan and Dramatic Burlesque;

Chapter III, Jacobean and Later Seventeenth Century Parody and Burlesque;

Chapter IV, Eighteenth Century Verse Parody;

Chapter V, Burlesque of Eighteenth Century Lyric Kinds, and The Rolliad;

Chapter VI, Early Prose Parody and Burlesque;

Chapter VII, The Anti-Jacobin-Political and Social Parody;

Chapter VIII, Parody of The Early Romantic Poets;

Chapter IX, Modern Prose Parody—Jane Austen to Bret Harte;

Chapter X, Verse Parody From Bon Gautier to Heptalogia;

Verse Parody of Today, having regard to the fact that the book was published in 1931. That is Chapter XI.

Chapter XII, Burlesque of The Esthetes, and Prose Parody of Today.

A. May I comment on the table of contents? That you will notice he does not stress burlesque very much. His interest is in the rather corrosive political and social satire.

Q. That, I suppose, can speak for itself. But practically every chapter heading mentions burlesque.

A. He doesn't have theatrical burlesque.

Q. Which parodied works and their parodies or

(Testimony of **Frank C. Baxter.**)

burlesques did you read in preparation for your testimony here today?

A. Stephen Leacock, Bret Harte.

Q. Which?

A. Bret Harte's parodies; Thackeray's parodies.

Q. Let's take Bret Harte. What of his did you read?

A. Miss Mix, for instance. Miss Mix it is called.

Q. And that is a parody or burlesque of what?

A. Charlotte Bronte's Jane Eyre.

Q. Is that poetry, prose, or drama?

A. It is prose, as its original is prose.

Q. What others did you read?

A. Sherlock Holmes, which is called Hemlock Jones.

Q. By whom?

A. By Conan Doyle, Sir Arthur Conan Doyle.

Q. I mean Hemlock Jones is by whom?

A. Bret Harte, 1899.

Q. That, again, is prose? A. That is prose.

Q. Which of the Doyle works does that parody?

A. The Sherlock Holmes stories.

Q. Which? The Study in Scarlet, Sign of The Four, and The Hound of The Baskervilles, or one or more of the short stories?

A. It does what the parodist and the burlesque writer often does. That is, he goes to the important things that make a work significant. Now, in this house there are many mansions, and one way of burlesquing is to burlesque style, if style be the important thing. For instance, we have seen these

(Testimony of Frank C. Baxter.)

burlesques recently of Dragnet. Now, no one can remember what happens in a Dragnet story ten days later, but you remember the two men, the underplaying, the people [81] trying to do their duty against difficulty. So the burlesquer turns to that.

Q. So Hemlock Jones is a burlesque of the Doyle style?

A. The Doyle character with all of his eccentricities, and his fawning, sycophantic Dr. Watson, who begins by licking his shoe.

Q. But it does not imitate even in the comic vein any particular incident or series of incidents in the Holmes stories?

A. No. On the other hand, Miss Mix does. That is a very interesting section-by-section parody of Charlotte Bronte's Jane Eyre.

Q. What others did you read in preparation for your testimony?

A. I read Donald Ogden Stewart's Parody Outline of History. Again that is a little different sort of thing from the regular theatrical burlesque, in that he imitates the important things about the style of a dozen or perhaps more, ten, modern writers.

Q. You also referred in the course of your direct testimony to the location in Allardyce Nicoll of some of these, at least the impression I got from your testimony, of these many dramatic burlesques; can you point out a place in the work, which I now put before you, consisting of two volumes of text

(Testimony of Frank C. Baxter.)

and two volumes of index to which you [82] were referring?

A. What is the question specifically?

Q. I thought you said this morning, in response to a question, that various of these dramatic burlesques of which you made mention could be found in Allardyce Nicoll's work.

A. Yes. Will you come here a moment, and I will show you what I did. You will notice in this check-list, which has been done over many years, you have burlesques here, The Golden Ring; what I did was go in the general index of the book and trace that down and see what that was. If it was in the text somewhere, I mentioned it here. If not, if it was a burlesque on something, the source of which I could not be sure, I did not mention it in my list. But you know this is a catalogue raisonne. It gives you burlesque. The Young Recruit——

Q. What you are referring to is what is published in this set, it happens to be Volume 2, but Volume 1 is the same, is it not?

A. That's right, and many of these references lead you back to Volume 1.

Q. Which is called a hand list of plays. And what that purports to be, is it not, is a list of nearly complete, or as complete as Mr. Nicoll could make it for the given period in the case of this volume, 1850 to 1900, of the plays that have been performed on the, I suppose, English-speaking [83] stage during that period? A. Yes.

Q. Is that right? A. Yes.

(Testimony of Frank C. Baxter.)

Q. Then opposite the title of each play he has a letter or series of letters, a symbol or key, which he explains as indicating the type of play that it is, and in those cases where he classifies the play as a burlesque he puts as the key the abbreviation Bsq.?

A. That's right.

Q. Now, you have taken those instances in which that key appears and then have traced them back to see if it appears in the text of this work?

A. Yes, or if I could get any other lead elsewhere on it.

Q. I think I am reasonably familiar with the sequence of the alphabet, but I could have made a mistake; can you find The Hunchback of Notre Dame in there? A. Yes, I will try to.

Q. At least I couldn't find it under name of author. I didn't have time to look for it under Title.

A. See, I may have got that from some other book, but I think it is here. Here is the Hump Back. You met that, of course. Let's see whether it is in this other volume. Is there a name index?

Q. That is one of the things that baffled me. If you recall in the old days the American Mercury Book Review, I would say this: The work sadly lacks an index.

A. Yes, that is true. One has to get at these things in half a dozen different ways and certainly there is the one I referred to, The Hump Back, two burlesques, one at the Edinburgh and one at the Strand.

(Testimony of Frank C. Baxter.)

Let me see what in my notes the secondary title of that was. Sometimes it is the secondary title.

Q. See if you don't agree with me, Doctor. So far as the table of contents is concerned, the only portion of this work, which is, incidentally, a work on nineteenth century drama, generally, it is not confined to burlesque or parody?

A. No, it is the general check-list of plays given in that time.

Q. The only section which seems to refer to burlesques would be Section 4 of Chapter III?

A. Very often these things, being minor, are in the footnotes, and you have the footnote reference.

Q. The statement that I just made is true, is it not?

A. For instance, here you have a burlesque Esmeralda, and the date is right, Sir Gayety Theatre, '79, Esmeralda; here is a comedy, Esmeralda; but if you chase it back using Odell's Annals of the English Stage—of the New York Stage, there are all sorts of check-lists to which you have to go. [85] This is the Esmeralda of the Hunchback of Notre Dame. I have no doubt that The Hunchback is buried in there as the second title of something with another main title, and I could find it in there under a footnote dealing with the Hump Back if you let me look for it.

Q. Anyway, with regard to these various burlesques that you read in preparation for your testimony, did your investigation extend to ascertaining with respect to the original, or model, or the work

(Testimony of Frank C. Baxter.)

which was being burlesqued or parodied, whether that work was one which was protected by any copyright law, or whether it was in the public domain at the time of the appearance of the burlesque? A. No, I did not.

Q. And did you carry on your investigation to determine what, if anything, had been taken from the original work in the burlesque or parody?

A. Wherever I could get the actual text, yes, oh, yes.

Q. In what instances did you get the actual text?

A. Quite notably the book there before you on the table, where obviously a text is just paraphrased in a comic vein from one end to the other.

Q. Then, having made that much of an analysis did you carry your researches on to ascertain whether or not the parody or burlesque was issued with the permission of the author of the original?

A. No, no.

Q. I think you said on direct examination that you never heard of any examples of requesting or obtaining permission to parody or burlesque one's work. Do you think that upon prodding your memory of your reading a little bit further that you might not think of some such example?

A. No, I don't know of any, that is quite true.

Q. Did you ever hear of Charles Lamb asking DeQuincy for permission to burlesque his Advice to a Young Man, whose education had been neglected?

(Testimony of Frank C. Baxter.)

A. No, I did not. I should know that, for I know of Lamb's own burlesque of things.

Q. That is right, he did burlesque with usually an introductory preface apologizing for it.

A. Sometimes he did as a hoax, trying to pass off the burlesque as an original.

Q. But certainly you do not know, with respect to various burlesques that have been issued from time to time, that permission was not obtained?

A. No. It would surprise me as a student of literature that it would be asked, for this is a form of criticism, and one doesn't write to Mr. Hemingway and say, "May I criticize," in such and such a magazine, "your novel?"

Q. Is all burlesque a form of criticism?

A. I think all laughter is in the sense that it values—it [87] studies values.

Q. What is there about Gas Light that is criticized, using it now in the technical term, by Auto Light?

A. Just this: You have a world full of doom and pressure and menace, and in the sense in which I use criticism and laughter, Gas Light is here, and Auto Light says, "Let us step into a merrier world where these things won't hurt." In that sense it is choosing between values.

Q. Well, it is setting up an opposing or contrary value? A. Quite a different value.

Q. But it is not——

A. But equally desirable.

Q. But it is not a criticism of a work in which

(Testimony of Frank C. Baxter.)

we think of the ordinary dramatic or literary review as such? A. No, no, that is true.

Q. Further, in analyzing these various works, and having read them, analyzing them to the extent that you could find a text to see what had been taken one from the other, did you make investigation to discover whether the state of the law was such at the time that the burlesque appeared as to make the taking, whatever it might have been, lawful or unlawful?

A. No, I did not. Legal consideration, of course, is beyond my powers. All I know is in our own day one sees [88] this frequently, and that is during my lifetime. I have seen many, many such burlesques. I have only to assume that it is part of the great tradition.

Q. I gather the gist of what you have been saying here today is that parody or burlesque, as the case may be, is in itself a separate art form, is that right? A. Yes, I think so.

Q. And I suppose you mean that it is a separate art form in the same sense that, let us say, drama is a separate art form from a novel?

A. There are categories based upon tone, and categories based upon purpose, and categories based upon form. The difference between the novel and the drama seems to me rather a formal one; but burlesque is in the many-mansioned house of literature, something characterized by a difference in tone and in purpose, it seems to me.

Q. Isn't drama a separate art form from the

(Testimony of Frank C. Baxter.)

novel, at least to this extent, that generally speaking —of course, there are exceptions—generally speaking it requires a somewhat different kind of creative ability? A. Yes, of course.

Q. And that it does serve a somewhat different purpose in the main?

A. Save that if one takes a play like Winterset and makes a novel of it, one preserves the tone, takes the [89] characterization, takes the theme, I suppose, or vice versa, in taking a novel and reducing it to a play, you are in a sense just changing the key.

Q. Would you say that the business of translating one work into another language is at least in a sense a separate art form? It certainly requires a different skill?

A. Yes, because what you have here is Homer in Greek, now you have Homer in English, the two things, and it is the wistful hope of the translator that it will be so alike that the only difference will be the difference in the different tongues.

Q. But it takes a considerably different type of skill than that of creating the original, whatever the language may have been?

A. Yes. Of course, the tragedy of translation is it takes the original skill, plus the linguistic one, for no translation is good unless the translator has some of the virtues and abilities of the creator.

Q. Certainly music is a separate art form from that of a novel? A. Yes.

(Testimony of Frank C. Baxter.)

Q. And the musical play is a separate art form from that of the ordinary dramatic composition?

A. It is a different species within the genus, yes.

Q. Have you either generally in the course of your [90] study of literature or specifically in preparation for your testimony here made any study into the law protecting the rights of authors?

A. Oh, no, that is beyond my power.

Q. I don't mean any study from the technical standpoint, but from the standpoint of acquainting yourself in a general way with what the legal status of others and their works have been from time to time in the history of literature.

A. From time to time, yes. As of one state, California, in 1914, I don't know. But certainly through the ages this thing has existed side by side, with the prime creation has come the secondary art of burlesque and parody, and it seems to have been sanctioned by the generality of men.

The Court: I don't think that is what counsel means.

The Witness: I am sorry.

Mr. Selvin: No, it isn't.

The Court: Is it true, generally, that the protection given an author has period by period increased from a period when there was no protection at all to the present when there is considerable protection given an author?

The Witness: Undoubtedly. It is a matter of obvious fact that it has increased as time has gone on.

(Testimony of Frank C. Baxter.)

Q. (By Mr. Selvin): As a matter of fact, haven't you [91] noticed in your various studies and readings that at least until the time of the introduction of printing in the Western World that the law apparently was very little concerned with the rights of authors in their writings?

A. Yes. Of course the publication did not exist in our sense.

Q. And haven't you also observed—withdraw that, let me ask you specifically, I suppose you are aware of the fact that the first copyright statute, the first act of Parliament or other legislative assembly of which we know, which formally secured authors any rights in their works was enacted in England in 1710 in the Statute of 8 Anne, Chapter 19? You are aware of that?

A. From there on it was progressive, of course.

Q. Are you also aware that prior to the Statute of Anne, which I say was enacted in 1710—pardon me, the printing press was introduced in England in 1425 or about there?

A. No. Much later. 1475.

Q. 1475?

A. The first printing in England was 1476.

Q. Then prior to Anne, Statute of 8 Anne, and certainly after introduction of printing in England, there was a considerable period there where printing or publishing was a monopoly of the Stationers Company under patent from the [92] Crown, was it not?

A. Wait a minute. That isn't the way to say

(Testimony of Frank C. Baxter.)

that. Not a monopoly of publishing. To keep utter chaos from reigning the Stationers Company permitted a man to say, "I am going to put out a book called Homer, as translated by Joe Doakes." All right. He could put his shilling down and receive a certain stay, which for a limited time would permit him to print that book, that is true.

Q. But without the license of the Stationers Company, publication and printing of a book in England was a wrong which was remedial in the star chamber, was it not?

A. That is difficult to say. Only where certain issues arose. But it was very loosely controlled. If you want control, if you are looking for controls, I give you the licensing Act in the seventeenth century, which meant that everything had to be passed by the Bishop of London. I don't like that, either.

Q. It is not the question of what kind of law we like, but the question of what in your searches you discovered the law to have been at any particular time in history. In any event, with the Statute of 8 Anne, authors are formally given, for the first time, so far as we know, in at least English or American history, the exclusive right for a limited term to print, publish, and republish their works?

A. That's right. [93]

Q. The Statute of Anne, however, was limited to just that, however, printing, publishing, and republishing their works? By that I mean it did not give them any exclusive right of dramatization?

A. That I don't know.

(Testimony of Frank C. Baxter.)

Q. Or of translation?

A. That I don't know.

Q. Or of condensation or abridgment?

A. That I don't know.

Q. Or anything of that sort?

A. That I don't know.

Q. You do know the Statute of Anne was limited in the benefits which it sought to confer to subjects of the British king?

Mr. Mitchell: He is asking the witness for a legal conclusion.

Mr. Selvin: I am asking him for what he knew.

Mr. Mitchell: I object to it on that ground. This man is not a lawyer, nor qualified to give such an opinion.

Mr. Selvin: I don't expect——

The Court: If he doesn't know, he can state so. It is historical background rather than legal.

Mr. Selvin: That is all I am interested in. If the witness knows it. If he doesn't know——

The Witness: No, I don't know the details of that. [94]

Q. (By Mr. Selvin): It has been true, you have observed this much, I will make it short—instead of going through the whole history of the legislation in England and in this country, of which the court can take judicial notice, you have observed in your reading a constantly growing pressure, and a concomitant response to that pressure, to increase and broaden the rights of authors in their works?

A. Oh, yes. As the rewards of authorship have

(Testimony of Frank C. Baxter.)

grown, as new media have made it possible for extra rewards to come in, this is true in every aspect of life. I made the mistake at the television studio of picking up a table and moving it six inches to where it would be desirable, and found that I had run afoul of an increasing tautness in life; that you can't move that table unless you are an ordained table-mover.

Well, of course, authors have to be protected, there is so much now to protect. But——

Q. Again I am not asking you——

A. If you are going to extrapolate this curve and show us a time when people will not be able to laugh at each other, I resign my card in the human race.

Q. I don't know that we have come to that yet, and that is not what I am talking about, Doctor, as I hoped I had made myself clear, but perhaps I hadn't. A. Yes, forgive that.

Q. You have observed, however, that there have been [9] various times in the history of the development of English literature when various uses could be made of an author's work for which at the then time the author had no legal redress?

A. Oh, yes. Dickens, for instance, yes.

Q. The Dickens reference is of course to the parodying of his works in this country?

A. Oh, no. In his own country.

Q. There was a time both in England, with respect to foreign works, that would be foreign there, and in this country with respect to works that

(Testimony of Frank C. Baxter.)

would be foreign here, where there was no protection for the works of foreign authors, and they could be pirated at will; that is right, isn't it?

A. Yes.

Q. And as a matter of fact, it was in this country only a comparatively late date that the works of foreign authors could be protected here?

A. Yes.

Q. In any event, as various ways of utilizing an author's work developed or became frequent, there was the inevitable pressure, at least from the authors' side of the argument, to expand the law to protect him in the use of that right?

A. Yes.

Q. You have observed, have you not, in your reading, that for the present the culmination of that effort came in [96] England with the enactment of the Copyright Act of 1911, the Statute of 1 and 2 George V, and in this country with the Copyright Act of 1909? You have——

A. Yes, I realize the growing stringency of these things.

Q. Do you attach any significance to the fact, and this you will have to accept, the factual part of my question you will have to accept for the purposes of your answer, I represent to you that to the best of my knowledge it is true, do you attach any significance to the fact that it was not until after the 1909 Act was enacted in this country, and the 1911 Act was enacted in England, that there is any

(Testimony of Frank C. Baxter.)

discussion in the legal decisions relating to the very property law of the right to parody or burlesque?

A. I was not aware of that.

Again, in this house there are many mansions, and certainly to take a play, a serious play, and make a shorter serious play, which in a sense is competitive and parallel to it, would seem to me to be actionable, as a layman looking on.

Q. The statement that I make is subject to one exception, there is one decision with which counsel here are all familiar, which I think was decided in 1903 in this country. But beyond that I think the statement that I made in my question to you is correct. [97]

You have yourself, have you not, Dr. Baxter, tried your hand at parody or burlesque?

A. No.

Q. Do you recall——

A. Wait a minute: Yes, I did once.

Q. Do you recall a little thing called Alice's Adventures in the Library? A. Yes.

Q. Was that——

A. Yes, that begins as parody for a minute, and then goes into sheer burlesque, yes.

Q. Without asking you to pass a literary criticism—I realize that would be immodest—would you say that that is a fair example of the genre we are talking about?

A. Yes, I would. Very much.

Q. There you set out to have a little fun with

(Testimony of Frank C. Baxter.)

some of the things that can and do happen in a public library. Did you not? A. Yes.

Q. As a vehicle for your fun you took three characters from Alice in Wonderland, Alice, The Mad Hatter, and the White Rabbit?

A. That's right.

Q. You had Alice follow the White Rabbit into the Library where the Mad Hatter—— [98]

A. She fell down the well, which she does in the original.

Q. Landed in the Library, and then followed the White Rabbit? A. Yes.

Q. The White Rabbit is apparently some sort of assistant in the library, the Mad Hatter is the librarian, is that right? A. Approximately.

Q. And the fun that you had consisted of, among other things, having, as I recall it, having one of the characters, I believe the Mad Hatter, tell Alice that he had gotten lost on the eighth floor of stacks somewhere and has subsisted on a diet of books until he ran onto Hervey Allen's Anthony Adverse, which he found to be undigestible?

A. No. That is in the Ballad of the Lost Librarian, which he tells.

Q. You used the three characters from Lewis Carroll? A. Yes.

Q. And you attempted an imitation of his general style, but you did not take incidents or sequence of events, or even language from Alice in Wonderland, did you?

A. No; but because this was not ostensibly a

(Testimony of Frank C. Baxter.)

burlesque of Alice in Wonderland, but of literary tastes in the 1930s—when was it?—the literary tastes, the profession of the librarian who struggles against all sorts of odds. In fact, the fun was in what I stuffed it with, the other was a vehicle.

Q. You took off from Alice in Wonderland, but you carried out your own design, nevertheless leaving to Lewis Carroll that which he had himself created in the manner of incidents, events, and literary expression?

A. I hope he would think so.

Mr. Selvin: I think that is all.

Mr. Mitchell: I would like to offer in evidence, your Honor, since the witness spoke about these, and since they are examples of the type of burlesque that uses a great deal of the original, the original work, The Cradle of The Deep, by Joan Lowell, published by Simon & Schuster in 1929, and the burlesque of that work entitled Salt Water Taffy, by——

Mr. Selvin: Corey Ford.

Mr. Mitchell: By Corey Ford, published by G. P. Putnam's Sons in 1929.

Mr. Selvin: Before——

The Court: Let's mark The Cradle of The Deep as Exhibit 12——

Mr. Selvin: Your Honor, I want to interpose an objection.

The Clerk: 12 was in the stipulation.

The Court: Is there a 12 referred to?

(Testimony of Frank C. Baxter.)

Mr. Selvin: There may be a 12, but it doesn't have to be [100] marked 12.

The Court: Mark one of them No. 12, the Cradle of The Deep, for identification, and the other 13 for identification.

Mr. Selvin: I have no objection, simply because the witness referred to it in the course of his testimony. But if it is offered for its own sake, then I have the same objection to that as I have to paragraph 13 of the stipulation.

May I ask one question on that, since you reminded me of it, and since you are offering it?

Mr. Mitchell: All right.

Q. (By Mr. Selvin): Isn't it your recollection after the Joan Lowell book came out it was subsequently exposed as being completely a hoax?

A. Some time later.

Q. Joan Lowell had never been born or raised on a ship, and the work was completely a work of imagination?

A. It has to be judged as a novel, rather than autobiography.

Q. But when it was first issued it didn't purport to be, and was not accepted as a novel but as a biographical work? A. That is very true.

The Court: The objection will be overruled, and Exhibits 12 and 13 will be received in evidence. However, they will be received in evidence for a limited purpose. They are not received in evidence on the theory that because Salt Walter Taffy was a parody of The Cradle of The Deep, that therefore

(Testimony of Frank C. Baxter.)

in 1953 TV can be a parody of Gas Light. But they can be received for all other purposes. Is that satisfactory?

Mr. Mitchell: That is satisfactory.

The reason you exclude it is not the reason we offer it for at all.

The Court: Are you through?

Mr. Mitchell: Unless your Honor has other questions of Dr. Baxter.

The Court: No.

Thank you, Dr. Baxter. It has been very pleasant. I would like to take one of your courses in literature. It has been much more pleasant than listening to these lawyers argue about intricate legal problems.

The Witness: Thank you.

Mr. Selvin: I can vouch for the fact that if his actual courses are anything like his TV show it would be pleasant and stimulating.

The Court: What time does your TV show go on?

The Witness: Advertising. Saturday at 11:00.

The Court: No wonder I have never seen it. Thank you, Doctor. [102]

Mr. Mitchell, is there anything further?

Mr. Mitchell: Yes, I would like to have marked now as Exhibit 4-D the script, Ah, Wilderness, produced as part of a radio show on April 12, 1936; and as Exhibit 5-D the script of the motion picture——

The Clerk: That is a cutting continuity, isn't it?

Mr. Mitchell: The cutting continuity, yes, of the motion picture Ah, Wilderness, produced by Loew's Incorporated.

The Court: They will be so marked for identification, 4-D and 5-D.

(The exhibits referred to were marked Exhibits 4-D and 5-D, for identification.)

Mr. Mitchell: These, these four exhibits, -A, -B, -C, and -D, are examples of Loew's pictures that have been burlesqued, and are not intended necessarily to be examples of all burlesques of all pictures. We simply selected some of Loew's pictures.

The Court: Are all four of them Loew's pictures, 5-A, -B, -C, and -D, cutting continuities?

Mr. Mitchell: Yes.

I think everything in the stipulation of facts has now been admitted in evidence, except the exhibits 4, 5, 6, and 7, the subdivisions of 4 and 5, and paragraph 13.

Paragraph 13 we now offer in evidence as a part of the background of burlesque which we desire to bring to the [103] attention of the court. It sets forth burlesques which have been done by Jack Benny of various Loew's pictures, both on radio and on television, and the burlesques which have been done by Benny of various motion pictures produced by other producers of motion pictures, those burlesques being done on radio.

The Court: Let me read it before you make your objection, Mr. Selvin.

Mr. Selvin: Very well, your Honor.

(Slight delay in proceedings.)

The Court: All right, Mr. Selvin.

Mr. Selvin: With respect to paragraph 13, I would like to divide it, your Honor, because it relates to two similar but different matters.

First, so much of the paragraph as relates to Benny's version of Loew's motion picture, that is the part that begins at the beginning of the paragraph and ends at line 24 on page 14 of the stipulation, we object upon each of the grounds, incompetent, immaterial, irrelevant, no foundation laid to show that the part copied was substantial, copyrightable, or not in the public domain; and upon the further ground that the alleged custom or customary use or practice cannot narrow or restrict or destroy the rights conferred by the copyright statute.

With respect to the remaining portion of the paragraph [104] which relates to Benny versions of motion pictures produced by other companies——

The Court: Where is that break line?

Mr. Selvin: Line 23 of page 14.

The Court: All right.

Mr. Selvin: We object upon each of the grounds just specified in our objection to the first part of the paragraph, and upon the additional ground that that is entirely a matter which is res inter alios acta and has no bearing upon the rights of the parties to this litigation.

The Court: All right. The objection will be overruled, both objections, and paragraph 13 will be received in evidence. However, I receive it in evidence pursuant to the statement that I made to you

heretofore, that the court will sort what is proper from what is improper.

And so your mind will be at rest, certainly the fact that Mr. Benny has in the past made burlesques of motion pictures does not mean that we are foreclosed from deciding that issue in this case. There are other matters contained therein, though, which throws some little light.

At any rate, I will receive paragraph 13 in evidence.

Are you going to offer separately, now, the other exhibits?

Mr. Mitchell: Yes. We will now offer Exhibits 4-A, 4-B, 4-C and 4-D in evidence. [105]

Mr. Selvin: We make to those the same objection as we made to paragraph 13.

The Court: All right. It will be received in evidence, and the same comment of the court will apply. 4-A, 4-B, 4-C and 4-D in evidence.

(The exhibits referred to were received in evidence as Exhibits 4-A, 4-B, 4-C, and 4-D.)

Mr. Mitchell: We also offer 5-A, 5-B, 5-C, and 5-D in evidence.

Mr. Selvin: The same objection there.

The Court: The same ruling.

Mr. Mitchell: We also offer in evidence Exhibit 6, which is the 1945 radio program of the burlesque of Gas Light, which your Honor heard played in transcription form, and Exhibit 7, which is the script of that radio program.

Mr. Selvin: Our objection in that regard was stated earlier in the proceeding, I think at the time

that I was presenting the stipulation, and I repeat that objection now.

The Court: The objection will be overruled. Exhibits 6 and 7 will be received in evidence. Again, what the court said previously will apply, except that this presents a little different problem.

There has been pled here the defense of laches, or estoppel, or something. For the benefit of counsel on that, I don't consider that too important, I may change my [106] mind, as a tentative view. I can see where Loew's might stand by and permit a radio skit of a motion picture, and at the same time protest very vigorously on a TV picture. And since the problem is different, I don't think it is too important. For instance, if the plaintiffs—the defendants, rather, here were again wanting to do the radio version, then I think the contention made would be a pretty pat one, that no objection had been made previously and one more slice off a cut loaf wouldn't do any harm. But because I think there are different media involved here, there is not much to concern us in that problem.

If you have different views on it I will be glad to hear from you.

Is there anything further now in the way of evidence?

Mr. Mitchell: We rest.

Mr. Selvin: Your Honor, all we have, we would now like to offer by way of rebuttal, and in view of the introduction in evidence of Exhibits 4 and 5, we would like to offer, in order to complete the record, the positive prints of the four motion pic-

tures involved, being specifically Mutiny on The Bounty; Dr. Jekyl and Mr. Hyde; Edward, My Son, and Ah, Wilderness, subject to the same conditions with respect to production, custody, and what have you, as were made in respect to Exhibit 2.

Mr. Mitchell: We don't have to look at those motion [107] pictures, do we?

The Court: We will mark them in this order: We will give them No. 14, -A, -B, -C, and -D. 14-A will be the positive print of Mutiny on the Bounty; 14-B, Dr. Jekyl and Mr. Hyde; 14-C, Edward, My Son; and 14-D, Ah, Wilderness; and they will be received in evidence under the same understanding, that they may remain in the possession of the plaintiff but will be produced if required at any subsequent court hearing.

Mr. Selvin: That is all we have.

The Court: Before you rest the case, I have several matters of inquiry.

Again I don't want you to think that I have any definite view in this matter as yet. I try to test out thoughts that I have in the matter.

Is there anything in your stipulation of facts concerning the number of people who saw Gas Light, the number of times it was exhibited, the number of different theatres and localities in which it was exhibited?

Mr. Selvin: To a considerable extent yes, your Honor.

The Court: You have some financial figures in there. I haven't read it all yet.

Mr. Selvin: I think you will find the countries in which it has been exhibited and the estimated total number of persons who paid admission fees.

The Court: What page is this?

Mr. Selvin: Page 10. Page 10, the latter part, is the number of persons who paid admission fees, estimated, both domestic and foreign, just under 52,000,000. 24,786,000 domestic, which of course means this country, and foreign 27,000,000.

The Court: All right. Now——

Mr. Selvin: That, with a specification of the countries in which it has been exhibited I think is as much as there is along the lines asked about.

The Court: All right.

Is there anything in the stipulation that estimates the number of people that would see the television, 1953, TV—the proposed TV of Auto Light?

Mr. Mitchell: No, there isn't anything in the stipulation.

Mr. Selvin: There isn't anything beyond the general statement that Jack Benny, of course, is one of the ablest and most popular comedians in that media, or words to that effect. I don't know that that is the exact language.

The Court: Can you arrive at some stipulation about what the potential viewing audience of a showing of Jack Benny's TV picture would be?

Mr. Mitchell: I think we can. But we don't have the facts here to do it. But there are methods of ascertaining [109] approximately what Mr. Benny's audiences have been and probably will be.

Mr. Selvin: I am willing, in that regard—I think

I am familiar with the type of compilations to which Mr. Mitchell would go for that information, and I am willing that he may resort to them with the aid of such expert interpretive advice as CBS has available to him, and he may put the results in the form of a letter addressed to the court, with a copy to me, and so far as I am concerned, I will stipulate that that is an estimate of what he probably will get.

Mr. Mitchell: We will get an approximate estimate within thousands.

The Court: It will only be approximate, that is all I want. We will call that Exhibit 15, and reserve a number for it, and the clerk will mark it in evidence when it is received.

Mr. Mitchell: I think we can send it in as a joint letter, so that it will be in the form of a stipulation.

The Court: All right.

Mr. Selvin: Any way you want it.

The Clerk: You say it will be in the form of a stipulation?

Mr. Selvin: This is a stipulation.

Mr. Mitchell: Whatever way is most convenient to the [110] court. We can send it in as a formal stipulation.

The Court: It has been stipulated. If it is a million off it won't make any difference. It is an estimate. No one knows exactly. We know there is a big TV audience, and I am interested in that problem.

Did you gentlemen want to discuss or argue this

matter some at this time, or do you want me to ask a few questions?

What are your desires?

Mr. Mitchell: Well, we would desire to have an opportunity to file an answering brief of some sort at least.

Mr. Selvin: I really have no preference, your Honor. Whichever will be the most expeditious and potentially enlightening method of disposing of the matter would be satisfactory to me.

I am willing and fairly well prepared, I think, to argue it orally now, or to submit our reply briefs and then argue it afterwards, if the court desires, or any other way.

The Court: Well, let me ask a few questions, and then I will let you file additional briefs if you want to, and then if we get to the place of wanting oral argument on it, I will inform you.

First, this is sort of hit and miss; Mr. Selvin, in your brief you have a point that you labeled the matter of implied consent. It makes a mighty good heading, and it is at about 17, entitled, "Fair Use Is Based on Implied Consent and the [111] Absence of Any Tendency to Supplant or Compete With the Appropriated Work."

Obviously I haven't read all the cases which you cite on that point, but from what I have seen are there any of those cases that discuss expressly this matter of implied consent, or is that your conclusion from looking over the cases and sort of coming to a group conclusion?

Mr. Selvin: No. There is, for instance, the Holt

case, which is quoted in part on page 19, where the court goes on to say—I don't know that it is particularly extended discussion: "In such cases"—— And speaking of fair use cases, "the law implies the consent of the copyright owner to a fair use of his publication for the advancement of the science or art."

The Court: What page are you reading from?

Mr. Selvin: Page 19 of our trial brief.

What I was reading from actually was a quotation from the case of Henry Holt & Co. vs. Liggett & Myers Tobacco Co.

Your Honor will recall that was a case where Liggett & Myers Tobac Company—in this case Chesterfields, rather than Lucky Strike—took three sentences out of a medical treatise and used it in an advertisement for a cigarette, and it was defended on the ground that it was a fair use, and in any [112] event an unsubstantial part of the treatise. And in that case the court expressly referred to the matter of consent.

There are, I am quite sure, others in which the rationalization of implied consent is to be found in the opinion, although by and large I think it is fair to say that it is just that, it is a rationalization of a result or reasoning on which the cases proceed.

The Court: I am glad you called my attention to that. The part that you refer to appeared at the bottom part of the page, and I didn't run on to it.

All right. Another question: There seems to be generally the growing tendency to protect the author in his rights. Certainly starting from an

historical background, the various Acts down to the present we see that tendency. Now, query: Judge Mathes some time back rendered a decision, I don't have the name of the case now, but it was a case involving the right of an author to the character that he created.

Mr. Loring: Sam Spade, Warner Bros. vs. CBS.

The Court: The Sam Spade character. In this action one of the plaintiffs is Patrick Hamilton, who is the author. His rights might well be different than the rights that Loew's have. If you followed the rationale of Judge Mathes' case, which I haven't read recently, but it seemed to me that he took [113] the position that the author creating a character reserved to himself the right to make further use of that character, and that when he contracted to sell the story to a studio, the studio had a right to use that character in the particular setting of the story, but did not acquire the right to use that character thereafter in other stories. Query: Are the rights of the plaintiffs, Patrick Hamilton and Loew's Incorporated, possibly different? The first query is does that rule have any application in this case? And if it does have any application, are the rights of the two plaintiffs, Hamilton and Loew's Incorporated, different?

Does anybody want to venture a shot at that?

Mr. Mitchell: This character business introduces, as Mr. Selvin well knows, an element which we don't have to meet here.

There is a serious question, Judge Carter, whether a character is copyrightable at all. Probably not,

as Judge Learned Hand has said, except perhaps in very extraordinary instances where the character is so imaginative and so clearly defined, as I believe he used the example Falstaff, as to perhaps be the subject-matter of copyright. But ordinarily characters are people, and in the world of literary property, if we are going to have any literary property, we have to preserve a field or series of fields of things that are not owned by anyone, and that everybody is free to use. [114] In that sense we are not expanding, I hope, the monopoly of authors so that they can close in and stop legitimate literary effort. So we have quarrels, Mr. Selvin and I, on those occasions, usually being—always being on the same side—with authors who attempt to close in on these common fields that can be used.

Now, characters is one of those things. And I think, as I recall it, that Judge Mathes said that he was not holding that characters were copyrightable. I may be wrong, but I think so. At any rate, there has been no case, I think, as yet, in which a character has been held to be copyrightable. So along with a lot of things you have characters free to be used by everybody.

The boy-meets-girl characters, nobody owns them, everybody can use them. And that question is, fortunately, not involved in this case, because that would be something else that would be brand new to decide.

The Court: It may not be involved because of the fact that the build-up of the character in the TV picture is not necessarily a duplication of the

character in the film, and likewise it is not such an unusual character as would be represented by Sam Spade, or the Lone Ranger, or some different characters that you might think of. But what goes through my mind is this, and looking at it purely as a matter of logic: Studios are entitled to be protected, broadcasting [115] companies are entitled to be protected, and so is the struggling author. The whole history of this matter of protection is one of a sad background. Take the progress made in Tin Pan Alley to where today the writer of songs can be assured something for his labors, and compare it with Stephen Foster and what happened to him with his great musical works. But isn't the writer himself entitled to protection? So, for example, if a writer creates a character, a character that stands out, to whom he gives a name—the name, probably, plus some of the physical characteristics and mental characteristics of the individual thereby identify him—and then he sells a story with that character in it to a studio or broadcasting company, as a matter of logic it doesn't seem to me that the studio or the broadcasting company can thereafter say that, "We have a right to write our own plays now with this character in it."

They may get somebody else with a different name that looks and sounds something like this fellow. But let's take the real case of taking the same name and the same character and then saying, "Because we bought your one story we are now going to make as many Sam Spade pictures or Joe Doakes pictures, or stories, as we want to": and it

seems to me there is a lot to be said on the matter of logic for the right of the author to in some way be protected in this character that he creates from exact copying. Query [116] whether it is involved in this case, because of the characterization of the husband in the film and the characterization in the motion picture. What called my attention to it is we see the poor author's name—I don't know the author and whether he is poor or otherwise, but so far nothing has been said about the author, everybody has been talking about the rights of the studio and the rights of the motion picture company.

Mr. Selvin: Let me clear that up to a little extent, anyway, your Honor. Loew's obtained from Patrick Hamilton the exclusive and perpetual—perpetual meaning, of course, for the life of Hamilton's copyright—motion picture rights in and to his play Gas Light. We have the right not only to make his play into one motion picture, but into remakes, reissues, anything that we want. But, however, it is just that play. We did that, prepared a motion picture which under the copyright act then becomes a work of which we, Loew's, are the author, and which we are entitled to copyright as a photoplay, and which was copyrighted as a photoplay.

Our contract with Hamilton authorizes, and incidentally he was notified before it was done and at least has not objected, authorizes us to join him as a plaintiff in any action arising out of our copyrighted motion picture or our use of his play in circumstances where necessary to protect [117] our interest. He was joined as a plaintiff, then, pur-

suant to that provision, and as I say, he was notified of the fact that we proposed to do it, and he can be taken to having consented to it.

He was joined for this reason, as far as we are concerned, and for this reason only: while as the copyright proprietor of the picture we are the copyright proprietor of the copyright which is in suit here, I thought perhaps the contention might be made that to the extent that that picture contained material taken from the play of Hamilton's, and of course it contains practically nothing else but material taken from the play of Hamilton's, it might be contended that we were nothing but a licensee of a portion of his copyright and therefore not entitled to maintain the action. And that is the reason for the provision in the contract, and we took advantage of it in order to have before the court the complete right in the literary material one way or another.

The Court: I take it you would be very unhappy if ultimately the court decided that the plaintiff Patrick Hamilton was entitled to an injunction and Loew's Incorporated was not?

Mr. Selvin: I wouldn't say I would be very unhappy. It would accomplish the practical result which Loew's seeks to accomplish, and certainly while it might make the procedure of policing photoplay copyrights a little circuitous, I [118] think most companies are in the position of having—as we have—the permission of the author of the basic literary material in connection with situations of this sort.

The Court: Is there any need, do you think, either one of you, to have this contract in evidence, or can we accept Mr. Selvin's statement as part of the record on that matter?

Mr. Mitchell: I don't see why there is. This is an action for infringement of the Loew's copyright, not for an infringement of Hamilton's copyright.

Mr. Selvin: The contention which I thought might be made has not been made. Had I been certain that it was not going to be made in the beginning, we never would have needed to avail ourselves of the right to join Mr. Hamilton as a party plaintiff. However, he is a party plaintiff and his rights, whatever they may be, are involved.

Although I must say that to this extent perhaps I am hurting myself, your Honor, I have always considered this as an action for infringement of the Loew's copyright in the photoplay, and not for infringement of Hamilton's copyright either in England or in this country of the play.

Mr. Mitchell: The action is not so framed.

Mr. Selvin: That is right.

The Court: Both parties concede, then, this is an action for an alleged violation of the Loew's copyright?

Mr. Selvin: That's right. [119]

Mr. Mitchell: That is what the complaint says, your Honor.

Mr. Selvin: That is all we intended it to be, although this other material is in there for the reason that I have indicated.

I might say, if it makes any difference, our con-

tract giving us perpetual motion picture rights included motion picture rights by every means, including television, our contract with Hamilton.

The Court: I had one other question now, but I have lost it. I think those are all the questions I have.

Mr. Mitchell: I think the kind of an answer that would be helpful to the court, or reply by way of brief, would be much more intelligible and better designed to accomplish its purpose if we did it carefully and not just speak off the cuff. For that reason we would like to have about 20 days in which to get such a brief in to you. Then if you want to ask more questions we would be glad to come up and answer them.

The Court: That is satisfactory, 20 days. Whose turn would it be first?

Mr. Selvin: We could have simultaneous briefs in the beginning. And I assume our replies—I don't care whether they are simultaneous.

Mr. Mitchell: The only problem is if you start in by [120] filing a brief, we reply, and then you reply to that, it runs into a considerable length of time here, which is a problem.

Mr. Selvin: As far as I am concerned I am willing to file simultaneous reply briefs. I know their position now, and they know ours, our affirmative positions and reply.

Mr. Mitchell: That is satisfactory.

The Court: All right. Twenty days for that purpose, simultaneous reply briefs to be filed.

The Clerk: Your Honor, you said 20 days for the reply brief. How about the opening brief?

The Court: There is just one more brief from each side to come in, and they are going to file them simultaneously.

Mr. Mitchell: You never had such a friendly lawsuit here, Mr. Clerk, that is the trouble.

The Court: To assist me in my thinking on this matter, let me just make one or two comments. I don't think there is any dispute of the right of criticism by a critic, and I doubt if the cases on criticism assist us very far along this route. The right to criticize in the sense of writing a critical piece on a play, whether it be laudatory or derogatory, I don't think is involved. Nor do I think that the parody of a small portion, or the burlesque of a small portion of some literary work would be seriously argued, even by the plaintiff, to be a violation of the copyright.

I think if the plaintiff has a case it comes down to [121] this, that the essential story, sequence, development of the plot and the climax have been taken lock, stock and barrel from the plaintiff's Gas Light.

If this did not involve a matter of burlesque, and if Jack Benny was putting out a picture other than burlesque, that was as close to Loew's Gas Light as this, I don't think anybody would argue but what there had been an infringement, because of the sequence of events, the build-up of plot, and the climax and so forth. So to my mind, at least tentatively, it comes down to a question like this: Assum-

ing that a person may take a small part of a picture and burlesque it, make a parody on it, can CBS or Jack Benny, or anyone else, take the essential story of Gas Light and then merely burlesque, as it were, the entire matter in a condensed form and say, "We may do so whether the owner of that copyright wants us to do it or not"?

And, again, we have to view the problem in the twentieth century and not in the eighteen-hundreds. This isn't a case of a couple of small theatres in London in the year 1825. This is a case where an immense amount of money has been spent in the development of, producing, and exhibiting industry of motion pictures, and here has come a competing medium of TV, which enables the TV exhibitor for a small amount of money to make a picture which will be shown to a large number of people, without the expense of providing the houses for [122] exhibition. The viewer furnishes his own TV set. You have a problem that has got to be viewed in twentieth century realities and not in the past of the eighteen-hundreds.

You have a problem, also, that when this goes up on appeal and it is finally decided by wiser men than I am, whatever court it finally lands in, it may well set a precedent that will seriously affect the TV industry and the motion picture industry.

Those are some of the thoughts that are going through my mind.

Another thought is this: I have read your briefs and have looked at some of the cases, and I understand that a criticism of a play is not actionable.

even if that criticism destroys the value of a play. In other words, a critic may write a bad piece about a play and the play is dead. If he is a good critic and is well-known, he may write a good piece and the play is made.

I understand that is not actionable.

The cases, some of them, seem to indicate that the question is whether or not the putting on of the burlesque or the parody destroys the economic value of the original. Other than on the basis that I have just indicated, would people be less apt to go and see Gas Light if they saw the parody or the burlesque?

Mr. Selvin was hitting at it with his questions of [123] destroying the bloom of the picture.

That brings you down to the question of the type of audience that sees a TV picture. When you deal with the theatre in 1850, you had a group of people that probably saw every show that came to London, and they would see whatever went on at both the theatres. And before the advent of TV you had a certain percentage or group of people who could be expected to see plays, a far greater percentage who could be expected to see motion pictures. Now you have TV, where there is no selectivity at all. Somebody turns a knob and they see a picture. Query: Are there persons—first of all, I don't want to depreciate the average American, because the average American is a very fine and great individual, but aren't there a lot of Americans, a lot of people who look at TV who would hear what was said about this being a burlesque or parody of M-G-M's

great classic Gas Light, who wouldn't even know what you are talking about, and who would spend 15 minutes watching Auto Light and think in their own minds that they had probably seen Gas Light, and who six months later when Gas Light was shown, say "Well, there is no use for me to see Gas Light, I saw a 15-minute version of it on TV and it doesn't interest me, I would rather go and see some other kind of a motion picture"?

These are the thoughts that are going through my mind on the basis of having seen these pictures and having read [124] your briefs.

Under the law cited by the defendants, plaintiff would not be entitled to injunction unless you could spell out that effect on the potential audience for future showings of Gas Light, as I read your authorities.

On plaintiff's side, if plaintiff can establish his implied consent theory it makes a lot of sense in what has gone on. We know that in certain cases, as shown by that paragraph 13, consent was asked to burlesque certain pictures; we know in certain cases consent was given because the star who was under contract with the studio was going to be used in the radio production. All of those things fall into place.

If you can spell out an implied consent theory, then all you say is that ordinarily consent is implied because burlesque advertises the product.

But when the lone individual comes along and says, "I do not consent," then your implied consent

of course cannot prevail over the express refusal of consent.

That is the reason I questioned Mr. Selvin whether he thought that any of his cases were directly in point on the implied consent problem.

Finally, of course, there is the problem that art and art forms should be free.

I was impressed by the witness' statement that it was [125] in the countries with democratic traditions and background that parody and satire and burlesque have flourished in its highest form. None of us like censorship or any of the matters that put restraint on the exchange of ideas.

However, I think, on the other hand, that right has to be balanced against the right of the author, or the holder of a copyright, to protect what he has paid for, because any substance given to copyright statutes or laws are common law rights and to that extent put a restraint on the free use of ideas or material.

Mr. Mitchell: Your Honor, you spoke with Mr. Selvin about the implied consent. I would like to leave this thought with you, because I think perhaps you are speaking of implied consent as if it were consent implied in fact, your reference to the fact that the author could withhold his consent, and then of course there couldn't be any consent implied in fact. Actually——

The Court: I was. And I realize there is the question of whether it is implied in law.

Mr. Mitchell: Actually the doctrine of fair use is not based on the consent implied in fact: the doc-

trine is based on consent imposed by law, if you please. The copyright law doesn't say anything about fair use, but the courts, in order to make it workable, have imposed upon it the right of other authors to make fair use of the copyrighted material. [126]

Now, the author can publish in his book, "All rights are reserved, nobody can criticize this work, nobody can quote from it, nobody can burlesque it, nobody can use it in any way"; there wouldn't be any consent implied in fact, that would be negatived by a statement, but they could still make fair use of it. And I don't think that the implied in fact consent solves the problem. The question is, does the law imply a consent to make the kind of a burlesque we are talking about.

The Court: As I say, these are just thoughts, and I was talking about implied in fact consent; and I am interested in finding out just what the cases say about either kind of consent.

It is your contention, is it, that there is a consent implied in law?

Mr. Mitchell: Correct. I don't know whether you call it implied in law or whether you could call it a consent construed by the courts into the copyright statute. And the only reason talk about criticism is important is perhaps because the copyright law doesn't permit quotations for the purpose of criticism; but for this doctrine of fair use, when Time or Life takes a motion picture and tells you the plot of it and quotes various bits of dialogue they would be violating the copyright law, but the

law has said they can do that. Now the question that is before your Honor is, does [127] the law say that you can use these copyrighted things as a springboard to make burlesques? That is a question of law.

The Court: The complaint asks for damages. I take it in view of the injunction that was entered into by agreement, that there has not been any damage and there will not be any damages involved in the case, is that right?

Mr. Selvin: At least we have not tried to prove any specific damages, and so far as the statutory damages provided by the Act are concerned, I can only say that Loew's interest in bringing this action was not to obtain any money to put in its bank account.

The Court: I will consider the issue of damages out of the case.

Mr. Selvin: We are interested in establishing the legal principle and in preventing the exhibition of these what we think are infringements.

The Court: Is there any possibility——

Mr. Selvin: Let me finish just this. I do think, however, that assuming Loew's is right and should prevail, I do not think that it should have cost Loew's anything to establish its rights, and when I agree the issue of damages is out of the case I do not include in that our request for attorneys' fees.

The Court: That is a small matter.

Mr. Mitchell: I think we should be entitled to attorneys' [128] fees too if we prevail. It shouldn't

cost us anything to establish rights that we have been exercising for years.

The Court: That letter we are going to mark 15, get it in within 20 days, the same as the briefs.

Mr. Mitchell: We will.

The Court: There has been running through my mind this thought: Is there any possibility that you gentlemen can get together on this and release the picture, or is this some matter of principle where you want to have the issue fought out and want the matter to go up, regardless of how the case is decided?

Mr. Mitchell: We are just trying to release this one picture, to tell you the truth. We have money invested in it, and it is inconvenient to make another picture, and it is inconvenient to get Mr. Benny to do a live show, and generally it is inconvenient at this point to be stopped. We have gotten too far.

The Court: What went through my mind, there might be various formulas that could be arrived at whereby if you are only interested in this picture this matter might be solved and the picture released. If, on the other hand, this is a matter of principle and somebody wants an adjudication on it, then there is no use spending any time on it.

Mr. Selvin: As far as the plaintiff is concerned, as far as Loew's is concerned, it is a matter of principle. [129] That is indicated by the fact that we are willing to waive damages notwithstanding the fact that the statute, if we are right, gives us

damages which could amount to a considerable sum, in view of the nature of the distribution that was made of the first picture. It is a matter of principle.

The fact that television is, in our opinion at least, a serious competitor of the motion picture industry, the increasing frequency with which a considerable part of the programs by which potential motion picture audiences are kept at home, consists of so-called parodies or burlesques of motion pictures, both current and past, I think, has compelled us to take a stand in the situation and discover one way or the other what our rights are.

The Court: I suspected something like that was involved.

Well, thank you, gentlemen. It is always a pleasure to have able lawyers try cases in this court. You know what you are doing and why you are doing it. And the way you have simplified an intricate case and reduced it to less than a day of testimony and discussion here has been very helpful. I want to thank you.

Mr. Selvin: Thank you, your Honor.

I think you will agree, at any rate, we have not made out of this case the sporting contest type of case that you referred to this morning.

The Court: No. You have complied in spirit and to the [130] letter with that what I consider to be the purpose of our rules.

Mr. Mitchell: It takes a great deal of time to do it, too, your Honor, you would be surprised. I

think probably by coming in here in court in a period of a few days we could have brought in this evidence, but the negotiating of this stipulation has taken a great many hours' time, which I think Mr. Gershon will agree to.

The Court: That is something that we judges do not see. I know in my case I for all intents and purposes left the active practice in about '40, and these civil rules of course were here in '38, I guess was the beginning of them, so I never practiced under these rules. It may be that we judges look at these rules as a godsend to us and litigants, and they may be actually very burdensome to counsel and litigants.

Mr. Mitchell: I think this was an orderly way to handle this case, but I think all lawyers will bear out what you have just said, that there is an awful lot of work for lawyers involved in the Federal Rules.

I didn't look upon this as a Federal Rule job. This was really a job to do in order to try it in an orderly manner. But it does take time.

The Court: Thank you.

(Whereupon, at 4:00 o'clock p.m. Tuesday, January 5, 1954, the hearing was concluded.)

[Endorsed]: Filed October 24, 1955.

[Endorsed]: No. 14928. United States Court of Appeals for the Ninth Circuit. Jack Benny, Appellant vs. Loew's Incorporated, a corporation, and Patrick Hamilton, Appellees. Columbia Broadcasting System Inc., and American Tobacco Company, Appellants, vs. Loew's Incorporated, a corporation, and Patrick Hamilton, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: November 1, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14928

COLUMBIA BROADCASTING SYSTEM, INC., a corporation, et al., Appellants,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON, Appellees.

STATEMENT OF POINTS

Appellants Columbia Broadcasting System, Inc., American Tobacco Company and Jack Benny hereby state the following points on which they intend

to rely on this appeal from the judgment rendered by the United States District Court herein:

1. Appellants' burlesque television skit "Auto Light" did not infringe appellees' copyright in the motion picture "Gaslight" since:

(a) A copyright secured under the United States Copyright Act does not vest in an author or proprietor the right to prevent another from creating a true burlesque of the copyrighted work.

(b) A contrary construction of the Copyright Act would make that Act unconstitutional (Constitution, Article I, Section 8, Amendment 1).

(c) "Auto Light" is a true burlesque of "Gaslight".

(d) Appellants did not "copy" or "take" any substantial amount of material which was protected by appellees' copyright.

(e) If there was any use made by appellants of appellees' copyrighted material, such was a fair use.

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Attorneys for Appellant Jack Benny

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 15, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANTS' AND APPELLEES' DESIGNATION OF RECORD ON APPEAL

To: The Honorable Paul P. O'Brien, Clerk of the above entitled Court:

Appellants Columbia Broadcasting System, Inc., American Tobacco Company and Jack Benny hereby designate the following portions of the record certified to the above entitled court by the Clerk of the District Court, which appellants consider material to the consideration of this appeal:

1. The entire Clerk's Transcript certified by the Clerk of the District Court, comprising pages numbered 1 to 107, inclusive.

2. The entire Reporter's Transcript of the proceedings in the District Court herein on January 5, 1954, comprising pages 1 to 132, inclusive.

3. All exhibits 1 to 14-D, inclusive.

4. This designation of record on appeal.

5. The Statement of Points filed herewith.

With respect to designation 3 above, you are advised that appellees and appellants intend to apply to the above entitled court for an order directing that all of the exhibits transmitted by the Clerk of the District Court be considered in their original form without printing.

Also with respect to designation 3 above, you are advised that following exhibits are in the possession indicated pursuant to stipulation and will be delivered to the Court of Appeals when necessary:

Possession of Appellees

Exhibit 2—Motion picture "Gas Light."

Exhibit 14a—Positive print of motion picture "Mutiny On The Bounty."

Exhibit 14b—Positive print of the motion picture "Doctor Jekyl and Mister Hyde."

Exhibit 14c—Positive print of the motion picture "Edward, My Son."

Exhibit 14d—Positive print of the motion picture "Ah, Wilderness."

Possession of Appellants

Exhibit 6—Transcript of 1945 radio program.

Exhibit 8—Positive print of 1952 Jack Benny television program.

Exhibit 10—Positive print of the proposed 1953 Jack Benny television program.

November ...., 1955.

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Attorneys for Appellant Jack Benny

[Endorsed]: Filed November 15, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION AND APPLICATION FOR CONSIDERATION OF ORIGINAL EXHIBITS

It Is Hereby Stipulated by and between appellants and appellees, through their respective attorneys of record, that subject to the approval of this Honorable Court the following original exhibits in the above-entitled cause which have been transmitted to this Court by the Clerk of the United States District Court for the Southern District of California, Central Division, may be considered by this Honorable Court in their original form without printing:

1. Plaintiffs' Exhibits 1, 3, 4a, b, c, d, 5a, b, e, d, 7, 9, 11, 12, 13, 15 (which is a Stipulation as to the approximate size of the audience for Jack Benny Television programs and which is a part of the transcript), 16 and 17.

Appellants and appellees, through their respective attorneys of record, respectfully make application to this Honorable Court for an order that the original exhibits enumerated above be considered by this Honorable Court on this appeal in their original form without printing.

Appellants and appellees through their respective attorneys of record respectfully make application to this Honorable Court for a further order that the following original exhibits which are presently in the possession of the parties pursuant to stipulation

be retained by said parties until desired by this Honorable Court:

1. Plaintiffs' Exhibits 2, 6, 8, 10, 14a, b, c and d.

Said exhibits are of an inflammable nature and hence it is considered best that they be kept by the parties until desired.

November 15, 1955.

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[Endorsed]: Filed December 1, 1955 Paul P. O'Brien, Clerk.

No. 14928

United States
Court of Appeals
for the Ninth Circuit

JACK BENNY, Appellant,

vs.

LOEW'S INCORPORATED, a Corporation, and PATRICK HAMILTON, Appellees.

COLUMBIA BROADCASTING SYSTEM, INC., and AMERICAN TOBACCO COMPANY, Appellants,

vs.

LOEW'S INCORPORATED, a Corporation, and PATRICK HAMILTON, Appellees.

Supplemental
Transcript of Record

Appeals from the United States District Court for the Southern District of California, Central Division.

In the United States District Court, Southern District of California, Central Division

No. 15602-C

LOEW'S INCORPORATED, a Corporation, and PATRICK HAMILTON,

Plaintiffs,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a Corporation, et al.,

Defendants.

OPINION

Carter, James M., District Judge.

This is an action for infringement of copyright pursuant to Title 28, U.S.C.A., § 1338(a) and Title 17, U.S.C.A., Ch. 2 [§§ 101 to 116.] A cause of action for unfair competition has been joined pursuant to Title 28, § 1338(b). Plaintiffs have waived damages and seek only an injunction.

The case presents novel questions in the law of literary property and is a case of first impression. It presents a major issue—Is a charge of copyright infringement, where the defendant has taken a substantial part of the copyrighted work, defeated by the fact that the appropriated material was used in or as part of a burlesque or parody of the copyright work, rather than in or as part of a serious or independent work? Stated in another way, is a burlesque, which takes a substantial part of a copyrighted motion picture, a fair use?

Loew's Inc., hereafter Loew's, seeks to enjoin Columbia Broadcasting System, Inc., hereafter C.B.S.; American Tobacco Company, hereafter American, and Jack Benny, hereafter Benny, from the performance of a humorous sketch, "Autolight," burlesquing the motion picture, "Gaslight," the literary property of Loew's.

In addition to denials of various of the allegations of Loew's complaint, defendants set forth three affirmative defenses.

1. That the use made by the defendants of "Gaslight" was a fair use, since it was a burlesque;

2. That Loew's complaint is barred by laches;

3. That the use by the defendants of "Gaslight" was a fair use, in that no one viewing the burlesque could reasonably think he was viewing the motion picture, and in that the showing of the burlesque did not and will not satisfy, in whole or in part, the demand that may exist or may have existed, for said motion picture.

Prior to December 5, 1938, Patrick Hamilton, a British subject and one of the plaintiffs[1*] conceived and wrote an original play entitled "Gaslight." The play was first published in the English language and copies of the play were first issued to the public in England, on February 17, 1939. By virtue of the British copyright Act of 1911, this constituted publication and the work was immediately protected,[2]

1*[See page 261 to 274 for footnotes to this Opinion.]

and shortly thereafter was publicly performed, first in Richmond and later in London, both in England.

On November 18, 1941, Hamilton deposited in the United States Copyright office a copy of the edition published in England,[3] and on December 5, 1941, this dramatic composition opened on Broadway under the name "Angel Street." The drama was successful, running 1295 consecutive performances, extending over a period of more than thirty-seven months. In September, 1942, the play "Gaslight" was republished in the United States under the name of "Angel Street" and Hamilton copyrighted this publication in the United States.[4]

The exclusive motion picture rights for "Gaslight" were acquired by Loew's from Hamilton and his assignee on October 7, 1942,[5] and commencing in December of that year Loew's expended $2,458,000 in the production and distribution of an original motion picture photoplay of the drama. The production by Loew's involved the labor and skill of many persons, employing the services of Charles Boyer, Ingrid Bergman and Joseph Cotton, artists in the cinema field. The actual making of the film extended over a period of almost two and one-half years before it was released in national and international distribution on May 5, 1944. Thereupon, Loew's copyrighted the motion picture photoplay.[6]

The picture "Gaslight" was exhibited by Loew's and its licensees in the United States, U. S. Army and Navy installations here and abroad, and in

fifty-six foreign countries. Approximately 52,000,000 persons paid admission here and abroad to see the picture and approximately $4,857,000 was received in gross rental.

The picture was withdrawn from domestic release in November, 1946. The international distribution still continues. It is a customary and usual practice in the motion picture industry to reissue pictures which have been highly successful in their initial release, five or more years after their first release. Substantial rentals are often received for such reissues. Loew's have not reissued "Gaslight." The script and the film is in evidence and the film has been viewed by the court.

On or about October 14, 1945, during Loew's domestic distribution of Gaslight, Benny, a performer in the field of comedy, caused to be written, produced, performed, and broadcast over a national radio network, a half-hour show featuring a fifteen-minute burlesque of the drama "Gaslight" with Benny and Ingrid Bergman in the leading roles. American was at this time sponsor of the show.

Loew's did not have prior notice of the Benny show, except as shown by Benny's testimony, hereafter. Bergman furnished to Benny's writers her copy of the shooting script of the motion picture "Gaslight." Loew's did not have notice of her act nor did it consent thereto. Prior to the preparation of the script, the Benny writers viewed the motion picture "Gaslight," and the stage play "Angel

Street." Clearly the defendant Benny, had access to the copyrighted material. The point is not in issue. A record transcription of this radio program is in evidence and has been heard by the court. A script of the program is also in evidence.

The radio program was publicly performed at the U. S. Army Redistribution Center in Santa Barbara, California, and from there put on the National Broadcast system.

However, it was stipulated that if Benny were called as a witness, he would testify that prior to this performance and to enable the prospective audience to fully appreciate the burlesque, Benny had requested of Loew's that a print of the then current photoplay "Gaslight" be sent to the Center for exhibition in the week preceding the radio program, and that Loew's furnished such a print. In the performance of the burlesque Benny burlesqued Charles Boyer, the male star in the picture, and Miss Bergman, appearing as Benny's guest star, performed a travesty upon her original screen role in Gaslight. No claim of infringement was ever made regarding this burlesque.[7] We credit Benny's testimony and find the radio program was done with Loew's consent.

More than six years later, on January 27, 1952, C.B.S. caused to be written and produced a Benny half-hour television program featuring Benny and Barbara Stanwyck in the leading roles. This was again a burlesque of "Gaslight," and was on January

27, 1952, broadcast over the C.B.S. networks, and sponsored by American. Again the burlesque occupied about fifteen minutes of the half-hour show, this performance however, being in an audio-visual medium, made some use of stage props. The actual performance was kinescoped[8] for transmission over those stations of the C.B.S. network, which were physically unable to receive the live broadcast. A copy of the film of television program and the script is in evidence and the court has seen the film. Benny received compensation for his services from C.B.S. and C.B.S. received compensation from American.

Loew's, on January 30, 1952, dispatched a letter to C.B.S. inferring that they considered the latter burlesque an infringement of their property. Loew's further notified C.B.S. that they intended to "enforce our rights if they be infringed." C.B.S. acknowledged receipt of this letter but denied infringement claiming "fair use" including the "right to parody literary properties." Loew's then informed C.B.S. that the program constituted a copyright infringement. The dispute was not settled.

About May 28, 1953, C.B.S. commenced the preparation of a motion picture for television, burlesquing "Gaslight" and starring Benny and Barbara Stanwyck. On June 9, 1953, Loew's received notice that defendants contemplated this further remake of the "Gaslight" burlesque for the Benny television show. On June 9, 1953, Loew's gave notice that they con-

sidered the prior performance and the proposed remake, an infringement of their copyright.

Loew's commenced this action on June 10, 1953, and a restraining order was issued. It was modified by consent to permit the filming of the proposed television show and the film was impounded by court order. A copy is in evidence and has been viewed by the court. It was stipulated that defendants intend to and will, unless and except as restrained by this court, exhibit and cause to be exhibited the film throughout the United States over all the television channels and networks of C.B.S. Prior to June 10, 1953, C.B.S. had paid or obligated itself in the sum of $54,167 for the cost of the script and filming of the proposed television show.

The program was planned for the year commencing September, 1953. The parties have stipulated that Benny's television program, between September and December, 1953, reached from 6,073,000 to 8,882,000 homes and 18,826,000 to 27,534,000 viewers, the exact number differing on various dates.

I.

There Was a Substantial Taking by Defendants

A detailed comparison of plaintiffs' "Gaslight" and defendants' "Autolight" appears in the margin.[9] The comparison leads the court to the following conclusions of fact; (1) that the locale and period of the works are the same; (2) the main setting is the same; (3) the characters are generally

the same; (4) the story points are practically identical; (5) the development of the story, the treatment (except that defendants' treatment is burlesque), the incidents, the sequences of events, the points of suspense, the climax are almost identical and finally, (6) there has been a detailed borrowing of much of the dialogue with some variation in wording. There has been a substantial taking by defendants from the plaintiff's copyrighted property. This the defendants impliedly, though not in so many words, concede. We say impliedly, because the defendants defend on the ground that they have made a burlesque of "Gaslight;" that such is "fair use;" that plaintiffs are barred by laches, and finally that the value of Loew's "Gaslight" has not been impaired and that Loew's have not and will not suffer damage.

It is well settled law that the owner of a copyright is entitled to be protected against the taking of a substantial portion of his protectable material. Universal Pictures Co., v. Harold Lloyd Corp., [9 Cir. 1947] 162 F. 2d 354, where the court said, p. 361. "The whole picture need not be copied to constitute infringement. The mere copying of a major sequence is sufficient." Sheldon v. Metro-Goldwyn Pictures Corp., [2 Cir. 1939] 81 F. 2d 49, 56, "* * * it is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate." Ansehl v. Puritan Pharmaceutical Co., [8 Cir. 1932] 61 F. 2d 131, 137, "A copy of a 'substantial part' constitutes an infringement," and cases cited therein.

"* * * When a study of the two writings is made and it is plain from the study that one of them is not in fact the creation of the putative author, but instead has been copied in substantial part exactly as in transparent rephrasing to produce essentially the story of the other writing, it infringes." Warner Bros. Pictures v. Columbia Broadcasting System, [9 Cir. 1954] 216 F. 2d 945, 950; cert. den.

Folsom v. Marsh, [Cir. Ct. Mass. 1841] 9 Fed. Cases 342, Case #4901, is one of the earliest cases on copyright law in the United States. The case concerns a "Life of Washington" which the court found infringed an earlier copyrighted work. The court met the issue as to how much taking constitutes an infringement. Justice Story's opinion, widely quoted, laid down the rule that the test is not alone quantitative but qualitative. The Justice said that courts must look (p. 348) "to the nature and objects of the selections made, the quantity and value of the materials used. * * *" and at (p. 348), "It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance." Story v. Holcombe, [Cir. Ct. Ohio, 1847] Case #13497, 23 Fed. Cases, 171, 173, said:

> "The infringement of a copyright does not depend so much upon the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages, they take from it that in which its chief value consists * * *"

Although ideas, abstract conceptions and similar matters are not protectable, on the other hand it is clear that the author's manner of treatment, expression, the incidents and details, and the sequence of events by which he works out and develops the abstractions, are copyrightable elements of his work, and will be protected. Sheldon v. Metro-Goldwyn Pictures Corp. [2 Cir. 1936], 81 F. 2d 49, at 54; "* * * others may 'copy' the 'theme,' or 'ideas' or the like, of a work, though not its expression." Dam v. Kirk La Shelle Co., [2 Cir. 1910] 175 Fed. 902, 907; MacDonald v. Du Maurier [2 Cir. 1944] 144 F. 2d 696, 701; De Acosta v. Brown [2 Cir. 1944] 146 F. 2d 408, 409-10; cert. den. 325 U. S. 862; Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App. 2d 556, 561-562, 90 P. 2d 371, 374. "Although there can be no property in an author's ideas, 'there may be literary property in a particular combination of ideas or in the form in which the ideas are embodied.' (Fendler v. Morosco, 253 N. Y. 281.)"

If this was the ordinary plagiarism case, without the defense of burlesque as a fair use, it would be crystal clear, under the controlling authorities, that there had been access, a substantial taking and therefore infringement.

We are thus brought face to face then with the major issue in the case. Is a substantial taking of a copyrighted property permissible when the taking is by use of burlesque and rests for justification on the theory of fair use? We also discuss the additional defenses asserted.

II.

The Extent of The Doctrine of Fair Use

(a) Generally

Copyrights and the rights flowing therefrom are entirely creatures of statute. Pursuant to the constitution[10] Congress enacted the Copyright Act[11] and "instead of sanctioning an existing right * * * created it." Wheaton v. Peters [1834] 8 Pet. 591, 660-661. Thus, "the protection given to copyrights in this country is wholly statutory." White-Smith Music Pub. Co. v. Apollo Co., [1908] 209 U. S. 1, 15.

> "By the common law, the author of a writing possesses the sole and exclusive right to publish it, but upon and after the first publication the writing may be published by anyone including the author, since the writing has gone into the public domain. Bobbs-Merrill Co. v. Straus, 1908, 210 U. S. 339, 28 S. Ct. 722, 52 L. Ed. 1086; Bobbs-Merrill Co. v. Straus, 2 Cir. 1908, 147 F. 15, 15 L.R.A., N. S. 766; Harper & Bros., v. M. A. Donohue & Co., CC 1905, 144 F. 491. The copyright statute extends the author's sole and exclusive right in accordance with its terms and provisions. Constitution of the United States, Art. I, § 8, Clause 8; Title 17 U.S.C.A.; Bobbs-Merrill Co. v. Straus, 1908, 210 U. S. 339, 28 S. Ct. 722, 52 L. Ed. 1086; Bobbs-Merrill Co. v. Straus, 2 Cir. 1908, 147 F. 15, 15 L.R.A., N. S. 766. In other words, it reserves the writing from the public domain for the ef-

> fective period of the copyright. What we have just said is what is meant by courts when they say: 'When the copyright comes in, the common law right goes out.' * * *" Warner Bros. Pictures v. Columbia Broadcasting System, [9 Cir. 11/9/54] 216 F. 2d 945, at 948; cert. den.

The history of the copyright statutes show an extension, legislatively, to the creator of protectable material.[12] The first copyright statute in 1790 gave protection to authors for fourteen years and by renewal for fourteen years more. The period has been increased by statute[13] to twenty-eight years with a renewal period in certain cases to the proprietor, and in others to the heirs of an author.

When case law held that abridgements or condensations and foreign translations of copyrighted works, were not an infringement, Story v. Holcombe, [C. C. Ohio 1847] 23 Fed. Cas. 171 (case #13497); Stowe v. Thomas, [C. C. Pa. 1853] 23 Fed. Cas. 201, (Case #13514); statutes amendatory of the copyright laws gave protection.

Judicially, the courts have taken a broad view of copyright protection in order to give to the copyright proprietor the exclusive right "to any lawful use of his property whereby he may get a profit out of it * * *" King Features Syndicate v. Fleischer [2 Cir. 1924] 299 Fed. 533, 536.

The purpose of the copyright laws are well summarized in Mazer v. Stein, [1954] 347 U. S. 201, 219:

"'The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.' United States v. Paramount Pictures, 334 U. S. 131, 158. However, it is 'intended definitely to grant valuable enforceable rights to authors, publishers, etc., without burdensome requirements; 'to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.' Washingtonian Co. v. Pearson, 306 U. S. 30, 36 * * * Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

The doctrine of fair use[14] arises from the essential nature of the copyright. While a patent "'confers an exclusive right to use * * * a copyright contemplates and permits fair use by all persons of the copyrighted work * * *' 18 C.J.S. Copyright and Literary Property, Sec. 92, p. 213," Karll v. Curtis Publishing Co. [D. C. Wis., 1941], 39 F. Supp. 836, 837.

Fair use and its companion fair comment have been widely discussed by the writers.[15] Ball in Law of Copyright and Literary Property states:

"The right of subsequent authors, publishers and the general public to use the works of others to a limited extent has always been universally recognized as consistent with the object of publication and the policy of encouraging

the dissemination of knowledge, learning and culture; * * *" (p. 259)

* * *

"Fair use may be defined as a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright. Fair use is technically an infringement of copyright, but is allowed by law on the ground that the appropriation is reasonable and customary." (p. 260). [Emphasis added.]

The right of fair use clearly exists, but the general statements of the text writers must be reduced to specifics in order to understand and define the extent and application of this right.

(b) The Impact of Commercial Gain or Profit.

It will be noted that Sec. 1, U.S.C.A., Title 17, consisting of five subdivisions, refers to doing the prohibited act "for profit" only in sub. (c) concerning a "lecture, sermon, address or similar production or other nondramatic literary work," and sub. (e) referring to "musical composition." The subdivisions concerning dramatic works which we are here concerned with, (b) and (d), make no such reference to "for profit." We assume that the words, "for profit" were used advisedly by Congress and insofar as a dramatic work is concerned, there may be infringement without a showing that the infringing was done for a profit.

But the factor of use for commercial gain has been considered by the courts in connection with most, if not all, infringements of copyrighted material, regardless of the particular subdivision of Sec. 1, U.S.C.A. Title 17, which is invoked. Thus, in the field of science and the fine arts, we find a broad scope given to fair use. "This doctrine permits a writer of scientific, legal, medical and similar books or articles of learning to use even the identical words of earlier books or writings dealing with the same subject matter." Thompson v. Gernsback, [D.C.N.Y. 1950] 94 F. Supp. 453, 454. The writer of such works "invites reviews, comments and criticism"[16] and we could add, the use of the books and portions and quotations therefrom for the purpose of the advancement of learning. He does not invite or consent to its use for commercial gain alone.

"* * * The law permits those working in a field of science or art to make use of ideas, opinions, or theories, and in certain cases even the exact words contained in a copyrighted book in that field. Sampson & Murdock Co. v. Seaver-Radford Co., [1 Cir.] 140 F. 539. This is permitted in order, in the language of Lord Mansfield in Sayre v. Moore, 1 East 361, 102 Eng. Reprint 139, 'that the world may not be deprived of improvements, nor the progress of the arts be retarded.' In such cases the law implies the consent of the copyright owner to a fair use of his publication for the advancement of the science or art," said Judge Maris of the Third Circuit, then District Judge, in Henry Holt & Co., Inc., v. Liggett

& Myers Tobacco Co., [D. C. Pa. 1938] 23 F. Supp. 302, 304. We do not think Judge Maris' use of the word art was used in a sense broad enough to include a T. V. program allegedly taken from a motion picture.

Criticism is an important and proper exercise of fair use. Reviews by so-called critics may quote extensively for the purpose of illustration and comment.[17]

As we draw further away from the fields of science or pure or fine arts, and enter the fields where business competition exists we find the scope of fair use is narrowed but still exists.

The impact of competition is shown in the field of publishing law books where the decisions are somewhat confusing. Using copyrighted law digests to run down cases and copying "lists of cases;"[18] taking citations contained in a copyrighted work to cite in another work;[19] and obtaining "cumulative citations and histories of the affirmances and reversals of cases" from a copyrighted work "for annotation purposes"[20] have all been termed a fair use. But by the same cases, other and more extensive use has been labeled infringement.

A synopsis of an opera,[21] or indices[22] of a copyrighted property may be properly made under the rule of fair use. The use of a copyrighted credit book for the purpose of ascertaining the name of persons and corporations engaged in business for use in another's work[23] is not infringement.

On the other hand, the taking of word lists, amounting to less than 15% of the printed matter, from French language books and adding thereto, when both "books met exactly the same demand on the same market" was an unfair use,[24] and the taking of three sentences from a doctor's copyrighted medical work by a tobacco company to advertise its cigarettes was not a fair use.[25] Where a newspaper used in an article, factual material taken almost verbatim from the copyrighted material in a rival newspaper, there was an unfair use even though the taking was "such a little one."[26]

Where a competing biography of Hans Christian Anderson leaned heavily on the copyrighted volume, and there was a copying of substantial and material parts of the book, fair use was not a defense.[27] The copying of choruses of a copyrighted song was a copying of a substantial and material part, in an action between competing publication companies.[28]

In connection with the showing of a movie, the fact that there was played only "short excerpts" of a copyrighted song, is no defense.[29]

Certain conclusions can be drawn from these cases. Judge Yankwich stated in a recent article:[30]

> "If the amount reproduced is legitimately necessary to review the book, or is a part of a scientific or other exposition of the subject, in which the theories expounded by others must be discussed, the use, regardless of quantity, is fair. If, on the other hand, the appropriation

of the copyrighted product of another is motivated by the desire to derive commercial benefit, the use, regardless of quantity, is unfair * * *". [Emphasis added.]

We have some question as to the breadth of the conclusions, more particularly to the second sentence, but think the statement generally correct. It was obviously made to point up the impact of commercialism on the doctrine of fair use. We would conclude that the purpose for which the use was made is of major importance, in consideration with various other factors, in arriving at a sound determination of the extent of fair use; that broader scope will be permitted the doctrine where the field of learning is concerned and a much narrower scope where the taking is solely for commercial gain.

(c) American Cases Referring to Parody or Burlesques.

Turning now to American cases involving parody or burlesque,[31] we find illuminating early decisions. The attempt to defend against copyright infringement by the claim that the infringing work was "merely a parody or burlesque" is not new. Such an attempt has been the subject of several decisions and has been disposed of, not by determining whether the alleged infringing use was parody or burlesque, but by ascertaining whether it amounted to a taking of substantial, copyrightable material. In other words, a parodized or burlesqued taking is treated no differently from any other appropria-

tion. Bloom & Hamlin v. Nixon, [C.C.E.D. Penn. 1903] 125 Fed. 977, involved the burlesque by Fay Templeton of the performance of one Lotta Faust in another dramatico-musical work, by singing the chorus of a copyrighted song and imitating the peculiar actions, gestures and tones of Miss Faust. Relief was denied and the court observed, "surely a parody would not infringe the copyright of the work parodied, merely because a few lines of the original might be textually reproduced." (p. 978.) The case stands for the proposition that where a small or unsubstantial part of the copyrighted material was used, the principal part of defendants' performance, being stage business, there is no infringement.

Hill v. Whalen & Martell Inc., [D.C.N.Y. 1914] 220 Fed. 359, involved the dramatization of plaintiff's copyrighted cartoon strip,[32] Mutt and Jeff. The defendant was held to have infringed, even though defendant contended the infringing production, "was a mere parody or burlesque of the original and was so intended." (p. 359.) A reading of the case shows a substantial taking. Though the court based its decision on the tendency of the infringing work to decrease the demand for the original (a point we consider infra) it is clear that the defense based on a right to burlesque was rejected.

The dividing lines between permissible and non-permissible parody is strikingly illustrated by two of the cases which are found immediately next to

each other in the reports—Green v. Minzensheimer, [C.C.N.Y. 1909] 177 Fed. 286, and Green v. Luby, [C.C.N.Y. 1909] 177 Fed. 287. In the first of these cases a parodized imitation of an actress' manner or style of singing a song, but in which no copyrighted material owned by the plaintiff was used, was held nonactionable. On the other hand, in the Green v. Luby case, where, in addition to mimicry or parody of the mannerisms of an actress who frequently sang it, a copyrighted song was sung, infringement was found. The court said in the Luby case, (p. 288):

"The next question is one of infringement. The defendant admits that she sings the copyrighted song with musical accompaniment, but she says that she does so merely to mimic the complainant Irene Franklin Green. She contends that she gives impersonations of various singers, including said complainant, and, as incidental to such impersonations, sings the songs they are accustomed to sing. The mimicry is said to be the important thing; the particular song, the mere incident. But I am not satisfied that, in order to imitate a singer, it is necessary to sing the whole of a copyrighted song. 'The mannerisms of the artist impersonated,' to use the language of the defendant's brief, may be shown without words. And if some words are absolutely necessary, still a whole song is hardly required. And if a whole song is required, it is not too much to say that the imitator should se-

lect for impersonation a singer singing something else than a copyrighted song. Bloom v. Nixon, [C.C.] 125 Fed. 977, is distinguishable in that in that case the chorus only of the copyrighted song was sung. Green v. Minzensheimer (decided by this court March 19, 1909) 177 Fed. 286, is distinguishable in that in that case the defendant imitated the singer without musical accompaniment, and the testimony as to just what she did was not clear." [Emphasis added.]

(d) Other Modes.

The question as to whether the protection given the proprietor of the copyright extends to other modes or forms of using or exhibiting his work would seem to be answered in the affirmative by the foregoing cases. Before we proceed to additional cases on that point, we note the statute itself.

Sec. 1, U.S.C.A., Title 17 reads in part—"Exclusive rights as to copyrighted works. Any person entitled thereto, upon complying with the provisions of this title shall have the exclusive right: * * * (b) to * * * make any other version[33] thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; * * * (d) to perform or represent the copyrighted work publicly if it be a drama; * * *; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part; it may in any manner or by any method be exhibited, performed, represented,

produced, or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever; * * *" [Emphasis added.]

Obviously the words "manner" and "method" are words of ordinary meaning, and must have different meanings or both would not have been used. But we do not rest our decision on the language of the statute and so do not decide whether "manner" is broad enough to cover burlesque.

The cases have considered the question as to other modes for the use of the copyrighted work but generally without reference to the express language above referred to. In King Features Syndicate v. Fleischer, [C.C.A. 2, 1924] 299 Fed. 533, at 535, the court said:

> "Copying is not confined to a literary repetition, but includes various modes in which the matter of any publication may be adopted, imitated, or transferred with more or less colorable alteration. The disguise of the source from which the material was derived does not defeat the protection of the copyright, nor does taking a part of the work constitute an evasion of the copyright. Lawrence v. Dana, Fed. Cas. No. 8,136, 4 Cliff. 80. The appellees did not take all of the copyrighted matter, or all its principal characters, but took one, the idea of the horse 'Sparky.'
>
> "We do not think it avoids the infringement of the copyright to take the substance or idea,

and produce it through a different medium, and picturing in shape and details in sufficient imitation to make it a true copy of the character thought of by the appellant's employee. Doing this is omitting the work of the artisan, but appropriating the genius of the artist. Falk v. Howell & Co., [C.C.] 37 Fed. 202." [Emphasis added.]

The emphasized words from the King case (supra)[34] have been quoted and relied upon in Nutt v. National Institute etc., [2 Cir. 1929] 31 F. 2d 236, 238, and Universal Pictures Co. v. Harold Lloyd Corporation, [9 Cir. 1947] 162 F. 2d 354, 361. In the King case (supra) the language was particularly in point since the defendants made a toy horse, fashioned after, labeled, and sold as "Spark Plug" and thereby infringed the plaintiff's copyright to a book of cartoons about a horse named "Spark Plug."

In Falk v. Donaldson, [Cir. Ct. S.D.N.Y. 1903] 57 Fed. Rep. 32, a lithograph infringed a photograph. In Falk v. Howell & Co. [Cir. Ct. S.D.N.Y., 1888] 37 Fed Rep. 202, a photograph was infringed although the infringing design was stamped on leather intended for the bottom or back of a chair. In Bracken v. Rosenthal, [Cir. Ct. N. D. Ill. 1907] 151 Fed. Rep. 136, a photograph of a copyrighted statue was held to infringe. In Rosenthal v. Stein, [9 Cir. 1953] 205 F. 2d 633, affirming Stein v. Rosenthal, [D. C. Cal. 1952] 103 F. Supp. 227, copyrights of statuettes were held infringed by similar statuettes used as bases for electric lights.[35]

(e) Defendants' Authorities.

Defendants think they find some support for their contention that burlesque is a fair use and therefore cannot constitute infringement even if the taking is substantial, by reference to English cases and textbook writers. But the exhaustive analysis of these matters by plaintiff in its final brief, utterly shatters any support therein for defendants' position.

Glyn v. Weston Feature Film Co., Ltd., [1916] 1 Ch. 261; 114 L. T. Reports 354, was a trial court opinion based on the facts. The judge found that "the incidents of the film to which even so remote a resemblance with any in the novel can be found are exceedingly few in number or importance * * * on the whole * * * I have arrived at the conclusion of fact that the film does not constitute any infringement of the plaintiff's copyright in the novel." (pp. 267-268). Thus the holding of the case was that the taking was not substantial. Justice Younger's further conclusion that burlesque would not constitute infringement and that "no case can be found * * * in which a burlesque * * * has been treated as an infringement of copyright * * *" (p. 268) was labeled by him as unnecessary for the decision and therefore was dictum.[36] The Glyn case dictum is not considered to correctly state the English law as to burlesque[37] and certainly does not control our case.

Carlton v. Mortimer, McGillivray's Copyright Cases, [1917-23] 194, the second English case relied

on by defendants is merely an extract prepared by the case book editor. Although it makes reference to the dictum in the Glyn case, in reality the case holds that the taking must be substantial and that the "burlesquing of these two trifling incidents * * * under a title which was somewhat similar in sound to, but yet different in fact from, the title of the novel, did not amount to an infringement * * *" (pp. 195-196)[38] Any other significance to be attached the case would be contrary to English law.[39]

The third English case Hanfstaengl v. Empire Palace, [1894] 3 Ch. 109, give defendants no support. The plaintiff was the owner of German copyrights in some paintings. These paintings were more or less reproduced as live tableaux in a theatrical presentation. The tableaux, it was held in prior litigation, did not infringe Hanfstaengl's copyright. (Hanfstaengl v. Empire Palace [1894] 2 Ch. 1). A new complaint was based on the publication, in defendant's newspapers, of rough sketches, not of the original paintings, but of the tableaux. All that can properly be said to have been decided is that a copy, of a copy which is not itself an infringement of the original, does not infringe, at least when its resemblance to the original is slight and remote.

Defendants' reliance on text writers give them no better support for their contention. Many of the works cited are not legal treatises but are apparently written for the lay public[40] and in any event they are no more authoritative than the decisions on

which they purportedly rely. Most of these writers discuss generally fair use and not specifically burlesque. Weil, Ball and Amdur are specifically contrary to defendants' position.[41]

Spring states, "The right of a fair comment, as to satire or burlesque, has seldom been openly questioned. Only the extent of use has been questioned;" and in referring to mimicry or satire which he groups as "parody," states "the element of good faith is essential in parody, i. e. it is essential that the use involved be humorous and be limited to satire, and that it not be plain copying as a device to sell entertainment by giving another's material.[42] [Emphasis added.]

Lindey states, "Parody * * * is not infringement unless it is a transparent cover-up for stealing."[43]

(f) Proof of Other Burlesques.

Defendants argue that they have shown a long established custom of the burlesquing of copyrighted works[44] and acquiescence of this view of the law by persons most interested, and cite 50 Amer. Jur., Statutes, sections 319 and 320, pp. 309 and 312, "indeed the practical construction of a statute, or the meaning publicly given it by contemporary usage, is usually presumed to be the true one," (pp. 309-310) and Sutherland, "Statutory Construction, 3rd Ed. § 5106, p. 518, "interpretations made by those lacking express statutory authority to make interpretations are given somewhat less weight in the construction of legislation. However, interpretations made

by the public and those affected by a law, interpretations resulting from the practice of the Bar, and interpretations made by administrative officials of similar legislation in other jurisdictions may have important bearing as to the meaning of a statute."

Defendants make much of burlesque produced in the past, based on the then current dramatic productions, dwelling at length on "Arizona" and the burlesque of it, "Travesty on Arizona." Both played in the fall of 1900.

But defendants' showing lacks an important element, namely a showing that no consent was given by the holder of the copyright permitting the showing of the burlesques. Conceivably, the owner of the "Arizona" copyright, (1) gave written approval, (2) oral approval, or (3) implied consent, thinking the burlesque might increase the popularity of his play and purposely doing nothing. Without a showing of an unconsented use, defendants' argument falls completely. Nor can we presume consent or lack of consent.[45] Many of the burlesques cited by Dr. Baxter were of works long in the public domain. Many were of works created long before copyrights existed. No showing was made as to which originals had been copyrighted.[46]

In the case of the 63 burlesques made by Benny, there is as to most of them a similar lack of proof by the defendants. The record shows that in five instances, consent was obtained and that in twelve

instances the materials were in the public domain.[4] We cannot speculate as to the remainder.

Assuming for argument some weight to popular construction, the argument falls completely in the absence of proof as to consent or lack of consent to the creation of these burlesques. If for example, consent had been given expressly or impliedly in a number of cases, these cases would be no part of a custom permitting the burlesque of copyrighted material, regardless of consent. The defendants' arguments reminds one of the famous Kipling verse,

When 'Omer Smote 'Is Bloomin' Lyre

When 'Omer smote 'is bloomin' lyre,
He'd 'eard men sing by land an' sea;
An' what he thought 'e might require,
'E went an' took—the same as me!

The market-girls an' fishermen,
The shepherds an' the sailors, too,
They 'eard old songs turn up again,
But kep' it quiet—same as you!

They knew 'e stole; 'e knew they knowed.
They didn't tell, nor make a fuss,
But winked at 'Omer down the road,
An' 'e winked back—the same as us!

To conclude, defendants have shown no custom permitting burlesque or parody of copyrighted material over the objections or regardless of the consent of the copyright holder.

(g) A Substantial Taking by Use of Burlesque Constitutes Infringement.

We proceed to a determination of the major question here presented. In the instant case, the economic value of plaintiffs' property far exceeds the value of the defendants' work. Loew's expenditure in production and distribution of "Gaslight" amounted to $2,458,000 as compared with an estimated $64,883.66 by the defendants in their production of the 1952 and 1953 burlesque exclusive of American's compensation to Benny. Television is engaged in active competition with motion pictures. The taking was for commercial gain for use in a competing entertainment field.

The serious, near tragic vein of the original, "Gaslight" was converted into the broad, low comic vein of the burlesque. Benny, using gags, puns, exaggerated mimicry, slapstick and distortion, all matters within the common fund of the public domain, has taken a substantial part of plaintiff's property, "Gaslight," and inverted of mood from serious to humorous. Tragedy and comedy, like love and hate are but opposite faces of the same coin. Defendants have transposed the work, from the serious to the comic vein. This is analogous to the situation in Leon et al v. Pacific Telephone and Telegraph Company, [9 Cir. 1937] 91 F. 2d 484, (supra), when defendant took plaintiff's copyrighted telephone book and inverted the list from an alphabetical one to a numerical one. Our case tests the statement of the court therein that no case can be found holding that

"wholesale copying and publication of copyrighted material can ever be fair use." (p. 486).

From the discussion heretofore and the authorities collected, we conclude that plaintiff's have a property right in "Gaslight" which defendant may not legally appropriate under the pretense that burlesque as fair use justifies a substantial taking; that parodized or burlesque taking is to be treated no differently from any other appropriation; that, as in all other cases of alleged taking, the issue becomes first one of fact, i.e., what was taken and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists.

On the other hand, there is no dispute as to the right of the stranger to the copyright to take an incident, a character, a theme, or even a bare plot and then in Dr. Baxter's apt words, "take off into the blue" and create a new work by burlesque,[48] or to make an even more extensive use of the copyrighted material so long as a substantial part is not taken.

That this line between the permissible and the forbidden may be hard to draw does not prevent its application. Nichols vs. Universal Pictures Corp., (2 Cir. 1930) 45 F. 2d 119, 122; cert. den. 282 U. S. 902. The taker or user acts at his peril as does anyone who under our system of laws, makes use of another's property.

III.

Reducing Demand for Plaintiff's Work Not an Essential to Recovery.

Defendants contend that the decisive test of whether the burlesque of a copyrighted literary property constitutes fair use is whether the burlesque will reduce the demand for the copyrighted work by superseding such work and satisfying the demand of the public therefor. They rely on certain language in Folsom vs. March, (Mass. 1841) Fed. Case #4901, 9 Fed. Cas. 342, at 344, and in Lawrence vs. Dana, (Mass. 1869) Fed. Case #8136, 15 Fed. Cas. 26, at 61. All that either of these cases said was that a reviewer may not by his work, "supersede" the original.

Hill vs. Whalen, (D. C. N. Y. 1914) 220 Fed. 359, 360, is relied on when the court says: "One test which, when applicable, would seem to be ordinarily decisive, is whether or not so much as has been reproduced as will materially reduce the demand for the original. * * * The reduction in demand, to be a ground of complaint, must result from the partial satisfaction of that demand by the alleged infringing production. A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright * * *" No authority is cited and the court referred to "fair criticism, serious or humorous," in drawing the conclusions above.

Also relied on are Justice Younger's remarks in Glyn vs. Western Features Film Company Ltd., [1916] 1 Ch. 261, 114 L.T. Rep. 354, 356, 1 Ch. 261, 268, that the older English cases "insist upon the necessity of establishing that the alleged piracy is calculated to prejudice the sale or diminish the profits or supersede the objects of the original work, whereas it is well known that a burlesque is usually the best possible advertisement of the original * * *"

But Leon vs. Pacific Tel. & Tel. Co., (9 Cir. 1937) 91 Fed. 2d 484, disposes completely of defendants' contentions. There the defendant relied on the fact his numerical telephone directory "serves a different purpose than plaintiff's alphabetical directory." At pp. 486-87 the court said:

> "The fact that plaintiff has not chosen to arrange its material in the inverted form used by appellants is no determinant of fair use. The inversion, without license, is not permitted merely because the holder of the copyright has not so used it. This is settled by the case of Fox Film Corporation vs. Doyal, 286 U. S. 123, 127, 52 S. Ct. 546, 547, 76 L. Ed. 1010, where the Supreme Court said: 'The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property.'
>
> A like conclusion has been expressed by the courts of England. Weatherby & Sons vs. In-

ternational Horse Agency and Exchange, Ltd., (1916), 2 Ch. 297, 304; 79 L. J., Ch. 609 * * * The court said.

'Then it is said that the real and only test as to whether or not the defendants have made an unfair use of volume 21 of the Stud Book lies in the answer to the question whether there will be any competition between such volume and the defendant's book * * * But, in my opinion, an unfair use may be made of one book in the preparation of another, even if there is no likelihood of competition between the former and the latter. After all copyright is property, and an action will lie even if no damage be shown * * *.' "

The mere absence of competition or injurious effect upon the copyrighted work will not make a use fair. The right of a copyright proprietor to exclude others is absolute and if it has been violated the fact that the infringement will not affect the sale or exploitation of the work or pecuniarily damage him is immaterial. Falk vs. Donaldson, (Cir. Ct. N. Y. 1893) 57 Fed. 32, 36-37; Reed vs. Holliday, (Cir. Ct. Penn. 1884) 19 Fed. at 325, 327; Warren vs. White & Wyckoff Mfg. Co., (D. C. N. Y. 1930), 39 F. 2d 922, 923; Johns & Johns Printing Co. vs. Paull-Pioneer Music Corp., (8 Cir. 1939) 102 F. 2d 282; Harms vs. Cohen, (D. C. Penn. 1922) 279 Fed. 276, 279; MacMillan vs. King, (D. C. Mass. 1914) 223 Fed. 862, 867-868.

We have heretofore commented on the impact of competition or the taking for a profit on the scope of fair use.[49]

We conclude that it is not incumbent on the copyright holder to show either damage, or a diminuting of the value of his property or a lessening of the demand for the copyrighted work. On the other hand, the fact that the infringing work competes with the copyrighted one or has been issued for commercial gain, rather than in the interests of advancement of learning is a factor to be considered in determining the extent of fair use, and in determining whether the taking was substantial.

IV.

Effect on Burlesque

The defendants make several broad contentions as to the results that would flow from a decision for the defendants, (1) that it would be the death knell to the art of burlesque; (2) that since burlesque has always flourished in democratic countries, such a decision would be a frontal attack on freedom in our democracy.

It seems patent that by 1955 the public domain abounds with material suitable for burlesque, and when there is added thereto the instances where the consent, expressed or implied, of a copyright holder may be obtained, there should be no problem in the defendants obtaining bounteous materials for a pursuit of this art.

Secondly this decision points out that an isolated incident, character, event, theme or setting may still be used by a stranger to the copyright, without consent, under the doctrine of fair use and the newly created burlesque, starting from such a spring board "may take off into the blue" to use Dr. Baxter's apt phrase. We hold only that the stranger to the copyright may not appropriate the whole or a substantial part of the copyrighted material. Fertile minds will experience no difficulty in providing Mr. Benny and others in his fraternity with ample material for the exercise of their special art. We have not sounded a death knell on burlesque; in fact we hope we have cleared the air sufficiently to give it more room for its erratic flights.

As for an attack on freedom, we confess we have difficulty in visualizing the loss of that freedom if Benny's activities are curtailed by this decision. Instead, the decision reaffirms a principle inherent in the democratic way of life—the right to own and enjoy one's own private property without fear of appropriation by another. The concept of private ownership of literary property is equally entitled to protection and is more in danger in this proceeding than are our other freedoms.

V.

Laches

Defendants claim plaintiffs are barred by laches from obtaining the relief here prayed. Plaintiffs by

the pretrial stipulation waived damages and seek only injunction.

The three burlesques, i.e., the Radio show in 1945,[150] the television show in 1952 and the impounded television show of 1953 are generally and basically the same. Crediting Benny's testimony, the facts show plaintiff consented to the 1945 Radio show. Clearly consent for that particular show and the use of copyrighted material therein, does not impart consent to any other or different use of it. The showing of a copyrighted motion picture at a different time or theatre from that for which license was granted, infringes. Metro-Goldwyn-Mayer, etc. vs. Bijou Theatre Co. et al., (1 Cir. 1932) 59 F. 2d 70; Tiffany Productions Inc. vs. Dewing, (D. C. Md. 1931) 50 F. 2d 911; 912-15; Metro-Goldwyn-Mayer etc. vs. Bijou Theatre Co. etc., (D. C. Mass. 1933) 3 Fed. Supp. 66, 74; Twentieth-Century Fox Film Corp., vs. Peoples Theatres of Alabama, (D. C. Ala. 1938) 24 Fed. Supp. 793. The above cases concerned contracts containing specified exhibition dates. An oral license of copyrighted material would give no greater right to use than would a license contained in a written contract, although the copyright proprietor's remedies might well be affected by the terms of the written contract. We think the above cases apply equally to the oral license.

As to the 1952 television show, Loew's protested promptly on hearing of its presentation. It claimed infringement. The fact Loew's did not then com-

mence an action is not a waiver. The dispute over the alleged infringement was never settled.

With this background existing, defendants commenced the preparation and production of the 1953 television show. Loew's on learning about the matter on June 9, 1953, promptly brought this action on June 10, 1953. Defendants in their brief state that they "in reliance upon plaintiff's conduct, incurred financial obligations" in connection with the 1953 show. We can perceive of no conduct on which defendants were entitled to rely. Defendants' expenditures were made after notice they had infringed by the 1952 showing.

In any event there was no undue delay in commencing the action even as to the 1952 showing. The period involved was from January 27, 1952, to June 9, 1953. Moreover, there are authorities for the proposition that delay alone is not sufficient to establish laches, but that the delay must be inexcusable and prejudicial to the defendant; in other words, that there exist reliance on the unexcused delay by the defendants to their prejudice. Major vs. Shaver, (D. C. Cir. 1951) 187 F. 2d 211, 212; Shaffer vs. Rector Well Equipment Co., (5 Cir. 1946) 155 F. 2d 344, 345; Rome Grader & M. Corp. vs. J. D. Adams Mfg. Co. (7 Cir. 1943) 135 F. 2d 617, 619. We find the defense of laches bad.

VI.

Unfair Competition

In the third count, Loew's charges unfair competition and alleges the trade name "Metro-

Goldwyn-Mayer" and the title "Gaslight" have each acquired a secondary meaning.

Loew's does not seriously urge this claim and no part of its briefs have been devoted to it. We find the plaintiff has failed to meet its burden of proof.

VII.

Relief Granted

The first cause of action involves the 1952 T. V. production, exhibited June 27, 1952. No threat has been made to again exhibit this production. Claim for damages have been waived as to all counts of the complaint. In view of the relief granted on the second cause (infra) injunctive relief on the first cause of action will be denied.

The second cause of action incorporates the allegations of the first and then alleged the facts concerning the 1953 T. V. production. The pretrial stipulation provides that defendants intend to and will exhibit these 1953 T. V. film unless restrained by the court. Plaintiff is clearly entitled to injunctive relief on this cause. The fact that the first cause is incorporated by reference in the second, does not hinder relief—if anything it aids. The 1952 and 1953 productions are very alike. Both infringe plaintiff's copyright. Thus the threatened showing of the 1953 impounded film is an equivalent of another showing of the 1952 production.

The court in is discretion may award attorney's fees to the prevailing party in a copyright infringe-

ment action. 17 U. S. C. A. §116. However, the question presented in this case was a nice one; there were no authorities squarely in point to guide the litigants or their counsel. After plaintiffs' commencement of the action, the matter has been treated as a test case. We think the interest of justice would be best served by refusing to award attorney's fees.

Plaintiff will prepare and serve findings of fact, conclusions of law and a decree within the time allowed by the Rules.

Footnotes

[1]Hamilton was joined as *plaintiff through the* abundance of caution of plaintiff's counsel. It was stipulated at the trial that this action involves solely the alleged violation of Loew's copyright. We do not reach questions concerning an author's alleged right to a character he has created. See Warner Bros. Pictures vs. Columbia Broadcasting System, (So. Cal. D. C. 1951) 102 F. Supp. 141, 147; affirmed and modified 216 F. 2d 945; cert. den. —— U. S. ——; Burtis vs. Universal Pictures Co., Inc., (1953) 40 Cal. 2d 823, 835.

[2]Under the British Copyright Act of 1911, publication is defined as "the issue of copies of the work to the public, and does not include the performance of a dramatic of musical work * * *". Unpublished works are fully protected by copyright if the author "was at the time of the making of the work a British subject." Copyright protection runs during the life of the author and for 50 years after his death. Hamilton is still alive.

[3]Hamilton received a Certificate of Copyright Registration. It is conceded Hamilton had a valid copyright.

[4]The republication in 1942 contained notice of the 1939 copyright by Hamilton and the additional words, "Copyright 1942 (Acting Edition) by Patrick Hamilton." Hamilton received a Certificate of Registration from the Registrar of Copyrights. No issue is raised concerning the validity of this copyright.

[5]No attack is made on the assignment. Nor are we concerned with its scope or extent or type of right transferred to Loew's. Loew's paid $150,000 for its rights.

[6]The motion picture photoplay "Gaslight" was first published with Loew's notice of copyright affixed, on May 5, 1944. Loew's received a Certificate of Registration. No issue is raised as to the validity of the copyright.

[7]The terms burlesque and travesty are not used here in a technical sense. See infra for definitions thereof.

[8]A process of recording any event on motion picture film for later broadcast or rebroadcast over television networks or stations.

[9]In view of the clear evidence of a substantial taking, we do not burden this decision with a comparison of dialogue.

I. Generally

Benny TV Program

1. Locale: London.
2. Period: 1871 when story begins.
3. Main setting: Gloomy old 4-story house.

MGM's "Gaslight"

1. Locale: London.
2. Period: "Early 1870's" when story begins.
3. Main setting: Gloomy, old 4-story house.

4. Characters: (TV Program)

(a) Husband "Charles Mannigham" (played by Benny) murdered a woman *15* years ago in this very house; married present wife so that "in the guise of an English gentleman" he can pursue search for jewels of murdered woman. He is following plan of driving his wife insane. He goes out nightly, sneaks back into attic to search. Is finally captured by man from Scotland Yard.

(b) Wife, "Bella Manningham," much in love with husband; pained that he leaves her alone night after night; worried she is losing mind; asks for his sympathy; she is victim of husband's plan to drive her insane; learns of husband's past; asks to see husband alone before he is taken away, and taunts him then calls Inspector.

4. Characters: (MGM's "Gaslight")

(a) Husband "Gregory Anton" (played by Charles Boyer) murdered a woman *10* years ago in this very house; married present wife (who inherited house) so he can pursue search for jewels of murdered woman. He is following plan of driving his wife insane. He goes out nightly, sneaks back to attic to search. Is finally caught by man from Scotland Yard.

(b) Wife, "Paula Anton," much in love with husband; pained that he leaves her alone nightly, fears that she is losing mind; asks for husband's sympathy; she is victim of husband's plan to drive her insane; learns of husband's past; asks to see husband alone before he is taken away, and taunts him then calls Inspector.

(c) Scotland Yard Inspector (TV Program) "Inspector" (played by Noble).

(c) Scotland Yard Inspector (MGM's "Gaslight") "Brian Cameron" (played by Joseph Cotton).

[TV Program and "Gaslight"]

Has been watching house for some time; comes to call on wife when husband out; tells her of husband's past, the murder of a woman in this house years ago; in talking with wife, Inspector gets her to admit she knows it is her husband prowling in the attic who makes strange noises there at night. Upon return of husband, Inspector has hidden, but appears when husband is bullying wife; places husband under arrest; allows wife to talk with husband alone a few moments while he waits outside door, then at her call, comes back and takes husband away into custody. We feel there is affection between Inspector and wife.

(d) Maid "Elizabeth"

Questioned by husband about picture out of place; denies touching it.

(d) Maid "Elisabeth"

Questioned by husband about picture out of place; denies touching it.

(e) Other servant in house: (TV program.)

Butler, "Jeeves."

(e) Other servant in house (MGM's "Gaslight.")

Maid, "Nancy."

II. Story Points.

(a) Husband pursuing a sinister, diabolical scheme to drive wife crazy.

(b) Husband murdered a woman years ago in this very house.

(c) Husband marries present wife, comes to this very house, so he can search for jewels of murdered woman, in attic.

(d) In order to search, husband leaves wife night after night, and pretends he is going elsewhere, actually coming back to own attic.

(e) Husband's method of driving wife insane, includes following:

(1) Telling her she is always forgetting things;

TV program: Wife "doesn't remember" things she does, husband tells her.

MGM script: Wife inclined to lose things and forget things, husband tells her.

(2) Puts picture(s) out of place, then accuses wife of having done this and forgotten it:

TV program: Turns 2 pictures upside down.

MGM script: Takes little picture off wall and hides it.

(3) Confines wife to her room, and he goes out night after night.

(4) Humiliates wife in front of servant(s) by calling her in to be questioned when picture found out of place.

TV program: (Maid, Elizabeth, is quizzed.)

MGM script: (Maids, Elizabeth and Nancy are quizzed.)

(5) Husband's searching for jewels in attic, has following effects which increase idea of wife's insanity:

(a) When he turns on gaslight in attic, lights in her room go lower; then later when he turns off gaslight in attic, her lights in her room come up higher again.

(b) His search in attic (makes queer noises) (has queer effect).

TV program: Wife complains of headaches, but when Inspector explains her husband was up in attic searching for jewels she says her headache is gone.

MGM script: Wife thinks she's hearing imaginary footsteps in attic,

(f) Husband calls in servants, after he has misplaced picture, questions them, in order to cast suspicion on his wife.

(g) Husband tells wife she is getting hysterical, and should sit down and calm herself:

(h) Husband asks why wife does these crazy things; says she is insane:

(i) Running idea that wife forgets things:

(j) Gaslights go down after husband leaves, and come up just before he returns:

(k) Wife pleads for sympathy and kindness from husband:

(l) Inspector from Scotland Yard, has been watching house, comes to visit wife when husband out; tells her of husband's dark past, reassures her of her sanity, captures husband.

(I.) Watching house.

(II.) Visits wife.

(III.) Tells of husband's crime.

(IV.) Reassures wife of sanity.

(V.) Captures husband.

(m) Husband returns, starts to bully wife again, when Inspector comes on scene.

(n) Wife asks to speak to husband alone, before Inspector takes him away; Inspector finally agrees and waits outside room within call.

TV program: Inspector ties up husband because wife asks to talk with him alone.

MGM script: Inspector already had tied husband up.

(o) Husband, tied up in chair, tries to talk wife into getting knife and cutting him loose.

TV program: Knife in desk.

MGM script: Knife in cupboard.

(p) Wife pretends she is going to release husband by cutting bonds with knife, then frightens him by implying instead she will kill him with the knife, then calls Inspector.

[10]U. S. Const. Art. 1, §8. Clause 8.

[11]Act of May 31, 1790 c. 18, 1 Stat. 124.

[12]The original subjects of copyright under Act of May 31, 1790, were confined to maps, charts, or books. Historical and other prints were added by Act of April 29, 1802. Musical compositions were included in the revision of 1831 (Act Feb. 3, 1831, c. 16, 4 Stat. 436). Under Act Aug. 18, 1856, authors of dramatic compositions, in addition to the sole right to print and publish, were given sole right to act, perform and represent such composition. Photo-

graphs and negatives thereof were provided for under Act. March 3, 1865, c. 126. 13 Stat. 540. The Act of July 8, 1870, c. 230, §86, 16 Stat. 212 which was superseded by provisions of the Act of March 4, 1909, c. 320, 35 Stat. 1082, included also painting, drawing, chromo, statue, statuary, as well as models or designs, as proper subjects of copyright.

[13]Act of Feb. 3, 1831, c. 16; 4 Stat. 436.

[14]Occasionally, the courts have referred to the right to use the non-copyrightable material in a copyrighted work as "fair use." (Sheldon vs. Metro-Goldwyn Pictures Corp., supra, 81 F. 2d at 54; Towle vs. Ross, supra, 32 F. Supp. at 127; Warner Bros. Pictures vs. Columbia Broadcasting System, S. D. Cal 102 F. Supp. 141, 148-149). In that meaning the question is only the conventional one in copyright cases, i.e., was the appropriated material, copyrightable. Primarily, however, the concept referred to as "fair use" relates to the extent to which copyrightable or protectible material may be used without express license.

[15]Chaffee, Reflections on the Law of Copyright, 45 Col. Law Review 503; Drone on Copyrights, p. 398; Nicholson, Manual of Copyright Practice, p. 86; Shaw, Literary Property in the United States, pp. 67-71; DeWolf, An Outline of Copyright Law, pp. 97-98.

[16]Yankwich, What Is Fair Use. Vol. 22, Univ. of Chicago Law Review, 203-209.

[17]Amdur on Copyright Law and Practice, p. 757; Ball on Copyright and Literary Property, p. 287; Nicholson, Manual of Copyright Practice, p. 86; Lawrence vs. Dana, (Cir. Ct. Mass. 1869) 15 Fed. Cas. 26, 60 (Case #8136); Folsom vs. March, (Cir. Ct. Mass., 1841), 9 Fed. Cas. 342 (Case #4901).

[18]West Pub. Co. vs. Edward Thompson Co., (2 Cir. 1910) 176 Fed. 833, 838 (dictum; other acts infringed).

[19]Edward Thompson Co. vs. American Law Book Co., (2 Cir. 1903) 122 Fed. 922.

[20]W. H. Anderson Co. vs. Baldwin Law Book Co., (6 Cir. 1928) 27 F. 2d 82, 89, but taking of citations held an infringement.

[21]G. Ricordi & Co. vs. Mason (D. C. N. Y., 1911), 201 Fed. 182, 184; aff. (2 Cir. 1913) 210 F. 277.

[22]Kipling vs. G. P. Putnam's & Sons, (2 Cir. 1903) 120 Fed. 631, 635.

[23]Dun vs. International Mercantile Agency, (Cir. Ct. N. Y. 1903) 127 Fed. 173.

[24]College Entrance Book Co. vs. Amsco Book Co., (2 Cir. 1941) 119 F. 2d 874, 876.

[25]Henry Holt and Co., Inc., vs. Liggett & Myers Tobacco Co., (D. C. Pa. 1938) 23 F. Supp. 302.

[26]Chicago Record-Herald Co. vs. Tribune Ass'n. (7 Cir. 1921) 275 Fed. 797.

[27]Toksvig vs. Bruce Pub. Co., (7 Cir. 1950) 181 F. 2d 664.

[28]Johns & Johns Printing Co. vs. Paull-Pioneer Music Corp. (8 Cir. 1939) 102 F. 2d 282.

[29]Harms vs. Cohen, (D. C. Pa. 1922) 279 Fed. 276, 278.

[30]What Is Fair Use, 22 Univ. of Chicago Law Review, 203, 209.

[31]It will be noted that the words "burlesque," "parody," "satire" and "travesty" are often used interchangeably. They do have certain technical distinctions, i.e., "parody" is usually the imitation of style of form; "satire" often carries the connotation of bitterness; "travesty" is synonymous with "burlesque" but is sometimes used to mean a long burlesque.

Encyclopoedia Brittanica, Fourth Ed. Vol. IV. page 423, "Burlesque. A form of the comic in art, consisting broadly in an imitation of a work of art

with the object of exciting laughter, by distortion or exaggeration, by turning for example, the highly rhetorical into bombast, the pathetic into the mock-sentimental, and especially by a ludicrous contrast between the subject and the style, making gods speak like common men and common men like gods. While parody (q. v.) also based on imitation, relies for its effect more on the close following of the style of its counterpart, burlesque depends on broader and coarser effects."

[32]Another cartoon strip case is Nat'l Comics Publications vs. Fawcett Publications, (2 Cir. 1951) 191 F. 2d 594, holding a trial judge improperly dismissed a complaint alleging that Fawcett's Captain Marvel in Whiz Comics, and other magazines, infringed the Superman strip.

[33]The use of the words "any other version" inserted in the statute by Act of Mar. 4, 1909, c. 320, 35 Stat. 1075, probably was only intended to re-enact existing law. See G. Ricordi & Co. vs. Mason, (D. C. N. Y. 1911) 201 Fed. 182, affirmed per curiam 210 Fed. 277; and Corcoran vs. Montgomery Ward & Co., (9 Cir. 1941) 121 Fed. 2d 572.

[34]King cites Lawrence vs. Dana, (Cir. Ct. Mass. 1869) 15 Fed. Cases 26, 59-60 (Case #8136) and in addition to the quote, paraphrases certain other language of Justice Clifford. The word "literary" in King appears as "literal" in Lawrence vs. Dana. We find practically the exact quote in the case of Simms vs. Stanton, (Cir. Ct. N. D. Cal 1896) 75 Fed. Rep. 6, 9, except the word "literal" is used instead of "literary." Simms probably took the quote from Lawrence vs. Dana.

[35]The holding of the case is approved in Mazer vs. Stein (1954) 347 U. S. 201, involving a like problem. Rosenthal vs. Stein, (supra) was one of the cases creating the conflict in Circuits which caused the Supreme court to allow certiorari in Mazer vs. Stein.

[36] If, therefore, it were necessary for me to express an opinion upon this aspect of the case, I should decide that on this ground also plaintiff fails." (114 L. T. Reports 356). (1916) 1 Ch. 261, 269

7 Halsbury's Laws of England, (2d Ed. 1932, edited by Lord Hailsham) p. 576, Sec. 893, "* * * if * * * a substantial part of an author's work is taken, it is not material to consider whether the user is fair or unfair * * *". Their follows a note commenting on the Glyn case and the following, "* * * since the * * * Copyright Act of 1911 * * * whereby reproduction in any material form was made an infringement of copyright there can be no justification for a user of copyright material based upon a supposed right to abridge or burlesque."

Copinger & Skone James, Law of Copyright, 8th Ed. 1948) p. 132 states,

> "If the burlesque consists of what is, in substance, a new work parodying an existing one but not making substantial use of its language or incidents, it is submitted there is no infringement. But a work which slavishly used the plot and incidents of another would not be defensible under the cloak of burlesque." (Emphasis added.)

A. D. Russell-Clark Copyright and Industrial Design (1951) p. 63, after citing Carlton vs. Mortimer, McGillivray's Copyright cases (1917-23) 194, (the second of defendant's English cases), states,

> "The Court held that these two incidents did not constitute a substantial part of the novel, especially in view of the fact that whereas the incidents in the novel were serious in nature, in the skit they were treated entirely as burlesque. This case raises the question of whether a burlesque can infringe a serious work. It is submitted that it may be an infringement, the material question for consideration being whether a 'substantial part' of the copyright work is or is not reproduced." (Emphasis added.)

[38]The titles were, "Tarzan of the Apes" and "Warzan and His Apes." Under American law the title to a work probably would not be protected by copyright law. Arnstein vs. Porter (2 Cir. 1946) 154 F. 2d 464; Warner Bros. Pictures Inc., vs. Majestic Pictures Corp., (2 Cir. 1934) 70 F. 2d 310, 311; Weissman vs. Radio Corp. of America, (D. C. N. Y. 1948) 80 F. Supp. 612; See, 23 A. L. R. 2d 216, Sec. 18, pp. 300; but may be protected under the law of unfair competition. Warner Bros. Pictures Inc., vs. Majestic Pictures Corp., (supra) p. 311; See 23 A. L. R. 2d 216, Sec. 19, p. 302.

[39]See note No. 37.

[40]Nicholson, Shaw, Spring and Lindey. See preface to the works. Shaw is not even a lawyer.

[41]For example, although the short excerpt from Weil which defendants give might indicate his accord with them, the fact is that in another section, citing Green vs. Luby, supra, 177 Fed. 287, to his text, he affirms the principle that even burlesque or parody infringes if it takes substantial copyrighted material from the plaintiff. (Weil, Law of Copyright, p. 418, sec. 1097). In the passages quoted from Ball only fair use in general terms is dealt with. But when Ball, elsewhere in his treatise, refers to Green vs. Luby, supra, 177 Fed. 287, and Hill & Whalen vs. Martell, supra, 220 Fed. 359, his discussion indicates clearly that he considers them to place limits on the right to appropriate copyrighted material for burlesque. (Ball, Law of Copyright and Literary Property, pp. 290-292, 422.) Similarly Amdur refers to these decisions as showing that fair use does not permit of substantial taking by way of burlesque. (Amdur, Copyright Law and Practice, pp. 748-749, 759-762, 777.)

[42]Risks and Rights, pp. 183-186.

[43]Plagiarism and Originality, p. 43.

[44]Dr. Frank C. Baxter, A.B. and M.A., University of Pennsylvania, Ph.D. University of Cam-

bridge and presently a professor of English Literature at the University of Southern California, was called as an expert witness by defendants. He reviewed the use of burlesque throughout the history of literature. In addition he summarized as follows:

1. Burlesque is a form of comic art, is as old as literature.

2. Burlesque "could not use bitterness or rancor. Burlesque is a happy thing."

3. Burlesque is rarely personal.

4. Burlesque is rarely of a whole work of art.

5. Burlesque changes the tone of the original.

6. It rarely bothers itself with the evil or the sham, the ignominious and the failure.

7. Burlesque is a sort of compliment.

8. It is a manifestation of the comic spirit.

9. Burlesque historically has flourished in those societies where there has been most democratic liberty.

10. Burlesque is a happy toying with serious things.

11. The stage has always laughed at itself.

12. There have been few important novels, verses or plays that have not been burlesqued.

[45]After Dr. Baxter listed 18 modern plays or works of which he said burlesques had been made, the following question was asked:

"In that connection, in your investigation of course you had no way to ascertain whether or not there was permission?

"The Witness: No, I had no knowledge of that." (Tr. 51.)

And on cross-exam. "Q. Then, having made that much of an analysis, did you carry your researches on to ascertain whether or not the parody or burlesque was issued with the permission of the author of the original?

"A. No, no." (Tr. 86.)

Dr. Baxter was asked this question. "Q. In the history of literature, is there any evidence that these

numerous burlesques were done with the permission of the owner of the original?

"A. I know of no case. It may have been, of course, but I rather doubt it. These are independent arts." (Tr. 53.)

[46]Dr. Baxter's testimony.

"Q. Anyway, with regard to these various burlesques that you read in preparation for your testimony, did your investigation extend to ascertaining with respect to the original or model, or the work which was being burlesqued or parodied, whether that work was one which was protected by any copyright law, or whether it was in the public domain at the time of the appearance of the burlesque?

"A. No, I did not." (Tr. 86.)

"Q. Further, in analyzing these various works * * * did you make any investigation to discover whether the state of the law was such at the time that the burlesque appeared, as to make the taking whatever it might have been, lawful or unlawful?

"A. No, I did not. Legal consideration, of course, is beyond my powers." (Tr. 88.)

[47]Although the court permitted in evidence over plaintiffs' objection, this material from paragraph 13 of the pretrial stipulation, listing Benny's other burlesques, obviously the fact that Benny burlesqued other plays or pictures is no defense to this action, if his acts herein were improper.

[48]Dr. Frank Baxter gave a definition of burlesque, as follows: "I think that it is a very excellent synonym for burlesque, take-off from something. It does not parallel in the sense that it just recreates the thing in a new tone, but it takes off from it, selectively, this element, this element, this element, in order to identify this is a burlesque that B is making of A, but it takes off into the blue with all sorts of things. It introduces extraneous materials; it takes one little detail and puffs it up beyond its significance in the original. It leaves out much, but it constantly comes back, so to speak, to refresh it-

self to the original, and then takes off again. But in no sense parallels the original." (Tr. 66-67.)

[49]See also W. H. Anderson Co. vs. Baldwin, (6 Cir. 1928) 27 F. 2d 82, 89; Karll vs. Curtis Pub. Co., (D. C. Wisc. 1941) 39 F. Supp. 836 at 837; Sampson & Murdock Co. vs. Seaver-Radford Co. (1 Cir. 1905) 140 Fed. 539, 541-42.

[50]CBS had no connection with this show.

[Endorsed]: Filed May 6, 1955.

[Endorsed]: No. 14928. United States Court of Appeals for the Ninth Circuit. Jack Benny, Appellant, vs. Loew's Incorporated, et al., Appellees. Columbia Broadcasting System, et al., Appellants, vs. Loew's Incorporated, et al., Appellees. Supplemental Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed February 8, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[fol. 275] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—August 15, 1956

(Omitted in printing)

[fol. 276] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—December 26, 1956

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 277] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRUIT

No. 14,928

JACK BENNY, Appellant,

v.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON, Appellees.

COLUMBIA BROADCASTING SYSTEM, INC., and AMERICAN TOBACCO COMPANY, Appellants,

v.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON, Appellees.

Upon Appeals from the United States District Court for the Southern District of California, Central Division

Before: Bone, McAllister, and Chambers, Circuit Judges.

OPINION—December 26, 1956

McALLISTER, Circuit Judge:

Patrick Hamilton, an English author and a British subject, some time prior to December, 1938, conceived and wrote an original play entitled, "Gas Light." It was published and protected by copyright in February, 1939. Shortly thereafter, it was publicly performed in England, first, in Richmond, and later, in London. On December 5, 1941, it was produced as a play in New York under the [fol. 278] name, "Angel Street," and had a successful run of 1,295 consecutive performances, extending over a period of more than 37 months.

On October 7, 1942, the exclusive motion picture rights for "Gas Light" were acquired by Loew's, Inc., better known under its trade name of Metro-Goldwyn-Mayer.

Loew's spent $2,458,000 in the production and distribution of the motion picture photoplay of "Gas Light." The

actual making of the film extended over a period of more than two and a half years.

In producing the motion picture, Loew's acquired the services of three great artists in the cinema field, Charles Boyer, Ingrid Bergman, and Joseph Cotton.

The photoplay, "Gas Light," was exhibited in the United States and fifty-six foreign countries. Approximately fifty-two million persons paid admission to see it. The gross receipts in rentals for the play amounted to $4,857,000.

There is no question of the right of the dramatic work to protection under the copyright laws of both Great Britain and the United States.

On October 14, 1945, Jack Benny, a successful performer in the field of comedy, after securing Loew's consent to present a parody of "Gas Light" on radio, caused to be written, produced, performed and broadcast over a national radio network a fifteen minute burlesque of the play. In preparing the program, the radio writers for Benny had access to the acting script of the motion picture, "Gas Light."

More than six years later, on January 27, 1952, the Columbia Broadcasting System caused to be written and produced a half-hour-long television show burlesquing "Gas Light," with Jack Benny in the leading role. It was broadcast over the Columbia Broadcasting System network and was "sponsored" by the American Tobacco Company. Neither Mr. Benny nor the Columbia Broadcasting System nor the American Tobacco Company secured consent from Loew's or Mr. Hamilton to publish and broadcast the television burlesque, or, as it is sometimes called, the parody.

Immediately after the presentation of the television show, Loew's dispatched a telegram to the Columbia Broadcasting [Vol. 279] System, notifying that company that Loew's was the owner of the exclusive rights of production and recording of the play, "Gas Light," and adaptations thereof by means of talking films, sound tracks, and television; that Columbia had used substantial portions of the play in its television program; and that Loew's intended to enforce its rights against infringement. A short time thereafter, counsel for Columbia replied to the above telegram, informing Loew's that its burlesque appropriation of the play, "Gas

Light," was a "fair use" of the dramatic work, and that Columbia had the right to parody it as it did in the television show. Loew's, in turn, informed Columbia that the burlesque television show constituted an infringement of the copyright of "Gas Light"; and when Columbia prepared for a similar presentation over several television channels, Loew's filed this action, and secured a temporary restraining order.

Upon a trial of the issues, the district court found that the Benny television play was copied in substantial part from Loew's motion picture photoplay, "Gas Light"; that the portion so copied was a substantial part of the copyrighted material in such photoplay; and that the Benny television presentation was an infringement of the copyrighted photoplay, "Gas Light." The court, accordingly, granted injunctive relief, restraining the showing of the television play, all of which appears in the able and comprehensive opinion by Judge James M. Carter, reported in 131 F. Supp. 165.

On review, the chief contention advanced by appellants is that the burlesque presentation of "Gas Light" was a "fair use" of appellees' photoplay; that, although the play was copyrighted, and neither Benny, Columbia, nor the American Tobacco Company had received any consent on the part of the copyright owners to adapt the play in the way they did, nevertheless, they had the right to adapt the original copyrighted dramatic work of the author of the play and of the photoplay version as a burlesque, and to present, vend, and appropriate it thus, for their own profit.

Appellees submit that the Copyright Act insures to the copyright owners the exclusive right to any lawful use of their property, whereby they may get a profit out of it. They further submit that there is no doctrine of fair use [fol. 280] which justifies the appropriation of substantial copyrighted material of a dramatic work without the consent of the copyright owner, whether such appropriation is made for the purpose of pirating the work openly, or under the guise of a burlesque or a parody.

In considering the law and its application to this case, the facts themselves are most important. The play is a remarkable dramatic production. As outlined by appellees and somewhat supplemented by the record, the play tells the story of a man who sets out upon a deliberate plan to drive

his wife insane. He is motivated in this endeavor by the need of having access to a house which was inherited by his wife and in which they live. Some years prior, he had murdered the aunt of his wife for the sake of some valuable jewels which he had intended to steal, but in which he had been frustrated. His method of achieving his objective of finding the jewels without the wife's knowledge, and, at the same time, avoiding her suspicion, is to keep her attention diverted by inducing in her the belief that she is having hallucinations, suffering great lapses of memory, and gradually losing her mind. He does this by abstracting, without her knowledge, articles which he had entrusted to his wife, and by removing a portrait from the wall, making her believe that she had been responsible for the misplacement of the articles and the removal of the picture, of which she had lost all recollection. He fosters such a belief in her, in part, by causing the servants to bear witness that they did not remove the portrait. The suspense aroused by the picture is focused upon whether he will succeed in his scheme of finding the jewels and driving his wife insane. He fails, because of the intervention of a detective from Scotland Yard who, suspicious of the husband's conduct, has become interested in, and then obviously enamoured, of the heroine. The detective apprehends the husband at the climax of the plot, binds him to a chair in his own home to secure his arrest, and then reveals the truth, which he has learned, to the wife. At her request, she is given an opportunity to talk to the husband, who attempts once again through his personal charm, to subdue her to his will. She, however, resists. In this scene, at her husband's request, she procures a knife, which he has kept nearby. The suspense is heightened by the question whether she will use the knife to cut her husband's bonds, as he has asked her to do, or whether she has come to a determination to [fol. 281] kill him. She does neither, but contents herself with denouncing him, and turning him over to the police.

A comparison of appellees' "Gas Light" and the Columbia television show discloses the following: The locale of Loew's photoplay is in the early 1870s when the story begins. In the burlesque television show, the story begins in 1871. The setting is a gloomy old four-story Victorian house. The characters are a murderer, his wife, a detective

from Scotland yard, and a maid. The murderer has killed a woman ten years before in this house. (In the Columbia television show, the time of the murder is fifteen years before.) Thereafter, the murderer marries the young girl who has inherited the house from the murdered woman, so that he can pursue his search for the jewels for which he had committed the crime. All of the foregoing is the same in the Columbia television show except that it does not mention that the wife had inherited the house.

In carrying out his objective, the husband follows the above mentioned plan of driving his wife insane, so that she may eventually be placed in an asylum. He leaves the house nightly and then secretly return through another entrance to the attic to search for the jewels. In one of the incidents, the husband questions, in the presence of the wife, the maid, concerning the picture which has been removed from its place on the wall, in spite of the wife's begging the husband not to humiliate her before a servant. The maid denies having touched the picture, and the husband uses this incident also to make his wife believe that she has lost her mind. The husband is finally caught by the Scotland Yard detective, who has deduced that he is the murderer.

During the entire play, except at the climax, the wife is deeply in love with her husband and is grieved that he leaves her alone each night. Because of the husband's machinations, she fears that she is losing her mind and repeatedly begs for the sympathy and understanding of her husband, who coldly repels her. The detective from Scotland Yard, who has been noticing the husband's suspicious actions and watching the house for some time, calls on the wife when her husband is away and tells her of his past and of the murder several years previously. In talking with the wife, the detective gets her to admit that she knows it is her husband who is prowling in the attic and making the [fol. 282] mysterious noises there at night. Upon the return of the husband, the detective conceals himself in the house, but appears as the husband commences to bully his wife. He then places the husband under arrest, allows the wife to talk with him alone for a few minutes while he waits outside the door, and then, at her call, returns and

takes him into astody. The foregoing is similar in both the photoplay and the television play.

Title 17 U.S.C.A., Section 4, provides, among other matters, that a copyright owner shall have the exclusive right to make any other version of the copyrighted work; to dramatize it, if it be a nondramatic work; to convert it into a novel or other nondramatic work, if it be a drama; to arrange or adapt it, if it be a musical work; to perform the copyrighted work publicly, if it be a drama; to make or to procure the making of any transcription or record thereof, by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever.

The district court found, as a fact, that appellants' television play was copied by them, in substantial part, from appellees' motion picture photoplay, "Gas Light" and that the "part so copied was and is a substantial part of [appellants' television] play, and of the copyrightable and copyrighted material in [appellees'] motion picture photoplay." The district court found as facts "(1) that the locale and period of the works are the same; (2) the main setting is the same; (3) the characters are generally the same; (4) the story points are practically identical; (5) the development of the story, the treatment (except that defendants' treatment is burlesque), the incidents, the sequences of events, the points of suspense, the climax are almost identical and finally, (6) there has been a detailed borrowing of much of the dialogue with some variation in wording. There has been a substantial taking by defendants from the plaintiffs' copyrighted property." (131 F. Supp. 171) Accordingly, the district court found that appellants were guilty of infringement of appellees' photoplay, "Gas Light."

The photoplay is an original dramatic work. It deals with incidents familiar in life and fiction, but the grouping [f.l. 283] of those incidents presents a novel arrangement of events; and it is that originality which is protected by copyright.

A comparison of the photoplay and the television play

indicates how much was copied. If the material taken by appellants from "Gas Light" is eliminated, there are left only a few gags, and some disconnected and incoherent dialogue. If the television play were presented without appellants' contribution, there would be left the plot, story, principal incidents, and same sequence of events as in the photoplay.

A review of the record, a comparison of the scripts of appellees' photoplay and appellants' television play, and a viewing of the motion picture photoplay and the television play, as projected upon the screen—all convince us that the findings of fact of the district court that appellants copied the photoplay in substantial part, and that the part so copied was a substantial part of the television play and of the material in appellees' photoplay, are clearly supported by the evidence.

Appellants' chief defense is that the use which they made of appellees' photoplay in their television play was a fair use, by reason of the fact that the material which they appropriated from the motion picture, "Gas Light," was used in the creation of a burlesque, and that by reason of such circumstance, they are not guilty of infringement.

The so-called doctrine of fair use of copyrighted material appears in cases in federal courts having to do with compilations, listings, digests, and the like, and is concerned with the use made of prior compilations, listings, and digests. In certain of these cases, it is held that a writer may be guided by earlier copyrighted works, may consult original authorities, and may use those which he considers applicable in support of his own original text; but even in such cases, it is generally held that if he appropriate the fruits of another's labors, without alteration, and without independent research, he violates the rights of the copyright owner. In these instances, as has been said, there are certain to be considerable resemblances, "just as there must be between the work of two persons compiling a directory, or a dictionary, or a guide for railroad trains, or for automobile trips. In such cases the question is whether [fol. 284] the writer has availed himself of the earlier writer's work without doing any independent work himself." *Chautauqua School of Nursing* v. *National School of Nurs-*

ing, 238 F. 151, 153 (C.C.A. 2). See also cases digested in 18 F. Dig., Copyrights, Section 55. But up to the time of the present controversy, no federal court, in any adjudication, has supposed that there was a doctrine of fair use applicable to copying the substance of a dramatic work, and presenting it, with few variations, as a burlesque. The fact that a serious dramatic work is copied practically verbatim, and then presented with actors walking on their hands or with other grotesqueries, does not avoid infringement of the copyright. "Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that wholesale copying and publication of copyrighted material can *ever* be fair use." *Leon v. Pacific Telephone & Telegraph Co.*, 91 F. 2d 484, 486 (C.C.A. 9). (Emphasis supplied) Whether the audience is gripped with tense emotion in viewing the original drama, or, on the other hand, laughs at the burlesque, does not absolve the copier. Otherwise, any individual or corporation could appropriate, in its entirety, a serious and famous dramatic work, protected by copyright, merely by introducing comic devices of clownish garb, or movement, or facial distortion of the actors, and presenting it as burlesque. One person has the sole right to do this—the copyright owner, inasmuch as, under Title 17 U.S.C.A., Section 1, he has the exclusive right to make any other version of the work that he desires. He can have it read or sung or danced or pantomimed or burlesqued, because, in the language of the statute, he has the sole right to "exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever."

The fact that it has been Mr. Benny's custom to present from time to time, his, or the Columbia Broadcasting System's "version" of various dramatic works during the past twenty-five years, is no defense to this action for infringement of copyright. Appellants cannot copy and present another's dramatic work as they have in the instance before us, unless they receive the consent of the copyright owner.

An apparently alternative contention that the presentation of the burlesque was, in effect, literary or dramatic [fol. 285] criticism and, therefore, not subject to an action

for infringement of copyright, would seem to be a parody upon the meaning of criticism.

The record in this case includes a beguiling dissertion on the history of the drama, of English literature, of parody, and of burlesque, by Dr. Frank C. Baxter, a widely recognized and eminent authority in this field of study. Briefs of appellants' counsel, too, disclose a wealth of literary appreciation. However, there is only a single decisive point in the case: One cannot copy the substance of another's work without infringing his copyright. A burlesque presentation of such a copy is no defense to an action for infringement of copyright. As was said by the district judge, a "parodized or burlesque taking is to be treated no differently from any other appropriation; that, as in all other cases of alleged taking, the issue becomes first one of fact, i.e., what was taken and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists." (131 F. Supp. 183)

The finding of the district court that appellants had copied a substantial part of appellees' photoplay is clearly supported by the evidence. The judgment is affirmed upon the findings of fact and conclusions of law of the district court and for the reasons set forth in the opinion of Judge James M. Carter.

[File endorsement omitted.]

[fol. 286] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14928

JACK BENNY, Appellant,

vs.

LOEW'S INCORPORATED, ET AL., Appellee

COLUMBIA BROADCASTING SYSTEM, ET AL., Appellants

vs.

LOEW'S INCORPORATED, ET AL., Appellees

JUDGMENT—Entered December 26, 1956

Appeals from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

[File endorsement omitted.]

[fol. 287] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 288] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 833

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed April 29, 1957

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5672-1)

SUPREME COURT, U.S.
Office - Supreme Court, U.S.
FILED
MAR 13 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 833 90

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, and JACK BENNY,

Petitioners,

vs.

LOEW'S, INC. and PATRICK HAMILTON,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1956

No. .....

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, and JACK BENNY,

Petitioners,

vs.

LOEW'S, INC. and PATRICK HAMILTON,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Columbia Broadcasting System, Inc., The American Tobacco Company, and Jack Benny pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on December 26, 1956.

Opinions Below.

The opinion of the District Court [R. 223-274] is reported at 131 F. Supp. 165. The opinion of the Court of Appeals [R. 277-285] is reported at 239 F. 2d 532.

Jurisdiction.

The judgment of the Court of Appeals [R. 286] was entered on December 26, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented.

Did the court below err in holding that the doctrine of "fair use" is inapplicable to parody and burlesque, and that accordingly the author of a parody or burlesque of a copyrighted work is limited to only such insubstantial use of that work as is permitted the ordinary literary appropriator?

Statutes Involved.

The Constitution of the United States provides in pertinent part as follows:

"Article I, Sec. 8:

"The Congress shall have power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

The Copyright Act, 61 Stat. 652, 17 U. S. C. Sec. 1, provides in pertinent part as follows:

"§1. Exclusive rights as to copyrighted works.

"Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

"(a) To print, reprint, publish, copy and vend the copyrighted work;

"(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete,

execute, and finish it if it be a model or design for a work of art;

* * * * * * * *

"(d) To perform or represent the copyrighted work publicly if it be a drama, or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;"

Statement.

This action was instituted by respondents to restrain petitioners from performing a parody or burlesque of respondents' copyrighted motion picture "Gaslight." The facts are not in dispute and were, in the main, stipulated [R. 47-75].

Prior to December 5, 1938, respondent Patrick Hamilton, a British author, wrote an original play titled "Gas Light" which subsequently was published, performed, and protected by copyright both in England and the United States [R. 49-52]. Respondent Loew's acquired exclusive motion picture rights to the play on October 7, 1942, for $150,000 [R. 52-53] and thereafter produced an original motion picture photoplay of the drama in which Charles Boyer, Ingrid Bergman and Joseph Cotten had starring roles [R. 53]. The motion picture photoplay entitled "Gaslight" was published with appropriate copyright

notice on May 5, 1944, and thereafter it was released for national and international distribution [R. 53-54]. The motion picture was withdrawn from domestic release in November, 1946, but its international distribution still continues [R. 56]. Up to August 31, 1952, the total production and distribution cost was $2,458,275.18, its total domestic and foreign revenues were $4,857,059.92, and nearly 52 million people had seen the picture [R. 55].

Since 1932, it has been the custom of the Jack Benny radio or television program to present short burlesques or parodies which poke fun at specific motion pictures and which are written especially for the program [R. 57]. In January, 1952, Barbara Stanwyck and Benny were featured on the Jack Benny program in a live television parody or burlesque poking fun at the motion picture "Gaslight" [R. 64]. The program was sponsored by petitioner The American Tobacco Company and was telecast over the Columbia Broadcasting System network [R. 64]. A television kinescope recording was made of the program and it was subsequently broadcast over stations affiliated with CBS [R. 64]. Thereafter Loew's notified CBS that it had exclusive rights to the production of "Gaslight," but CBS replied that the broadcast was a parody or burlesque which did not infringe the Loew's copyright [R. 65-67].

About May 28, 1953, CBS commenced the preparation of a filmed television playlet entitled "Autolight" which burlesqued "Gaslight" and which had been written especially for the Jack Benny program [R. 67]. It was

the intention of CBS to broadcast the parody or burlesque, which again starred Benny and Barbara Stanwyck, as a part of the filmed Jack Benny television program during the fall of 1953 [R. 67]. On June 9, 1953, Loew's notified respondents that it considered the making of "Autolight" to be an infringement of their copyright to "Gaslight," and on June 10, Loew's filed this action [R. 68]. The District Court entered a temporary restraining order against the production or performance of the parody or burlesque [R. 68]. The order was subsequently modified to permit the filming and printing of the proposed television performance but the film was impounded pending trial of the action [R. 25-27, 68].

Both the District Court and the Court of Appeals viewed the motion picture "Gaslight" and the television parody "Autolight" [R. 283]. Since it is believed that this Court will not wish to view the films in acting on this petition for certiorari, a synopsis of the motion picture and of the parody are set forth as Appendix A. Arrangements will be made to permit the Court to view the films if certiorari is granted or if the Court wishes to do so in acting upon the petition.

On May 6, 1955, District Judge Carter rendered an opinion in favor of respondents herein [R. 223-274]. The court held that "parodized or burlesque taking is to be treated no differently from any other appropriation; that, as in all other cases of alleged taking, the issue becomes first one of fact, i.e., what was taken and how substantial was the taking; and if it was determined that there was

a substantial taking, infringement exists" [R. 252]. On this question of fact, the court concluded that "there has been access, a substantial taking and therefore infringement" [R. 232]. The doctrine of fair use, the court indicated, does not justify any substantial use of a copyrighted work in the creation of a parody or burlesque [R. 252]. On May 20, 1955, the court entered findings of fact, conclusions of law and judgment which enjoined the performance of the filmed television program and ordered the prints thereof to be delivered up for destruction [R. 76-91].

The Court of Appeals affirmed on December 26, 1956 [R. 286]. The Court of Appeals adopted the holding of the District Court that a "parodized or burlesque taking is to be treated no differently from any other appropriation" and "if it is determined that there was a substantial taking, then infringement exists" [R. 285]. The Court of Appeals announced flatly that a burlesque presentation is "no defense to an action for infringement of copyright" and that "up to the time of the present controversy, no federal court, in any adjudication, has supposed that there was a doctrine of fair use" applicable to burlesque or parody [R. 284-285].

Reasons for Granting the Writ.

I.

This Is a Case of First Impression.

Although the literary art of parody and burlesque is as old as literature itself, the case presents squarely for the first time in the United States or England a legal question which underpins the entire art: Should an author in creating a parody or burlesque of a copyrighted work be limited to making only such insubstantial use of that work as is permitted to an ordinary appropriator, or do the nature and importance of this unique art form rather require that the recognized doctrine of fair use* be applicable to the author's use of the copyrighted work. The District Court recognized that "The case presents novel questions in the law of literary property and is a case of first impression. It presents a major issue . . ." [R. 223].**

Parody and burlesque constitute a wide genre of literary or dramatic composition lying within the realm of comedy in which an author seizes upon some well known "original" and, through distortion, inversion, exaggeration and all

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*The doctrine of "fair use," which is discussed at pp. 13-17, *infra*, permits a substantial use of copyrighted material for purposes which promote the progress of science and the useful arts.

**The novelty and significance of the issue have already provoked extensive comment in legal periodicals. Yankwich, Parody and Burlesque in the Law of Copyright, 33 Canadian Bar Rev. 1130 (1955); Note, Parody and Copyright Infringement, 56 Col. L. Rev. 585 (1956); Note, Burlesque of Literary Property as Infringement of Copyright, 31 Notre Dame Law. 46 (1955); Comment, 31 N. Y. U. L. Rev. 606 (1956); Comment, 28 Rocky Mt. L. Rev. 134 (1955); Comment, 10 S. W. L. J. 68 (1956).

the comic arts, tranforms the seriousness of the original into laughter.* By definition, there must be an "original" to burlesque or parody and it must be known to the audience of the parodist or burlesquer.** Moreover, because the author produces his comic effect by mental contrast, he must use enough of the original, which almost inevitably is serious or at least takes itself seriously, to remind the audience of its mood and content. A parody or burlesque is not simply a humorous work;

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*The Shorter Oxford English Dictionary defines "burlesque" as "That species of composition which excites laughter by caricature of serious works, or by ludicrous treatment of their subjects; a literary or dramatic work of this kind", and "parody" as "A composition in which the characteristic turns of thought and phrase of an author are mimicked and made to appear ridiculous, especially by applying them to ludicrously inappropriate subjects." Although technical distinctions can be made between burlesque, parody, travesty, and satire, the scholars themselves have not settled upon a definition of the terms and the question presented here does not require that a differentiation be made.

**This is not a requirement imposed by some abstruse scholar. About a year after Poe's "The Raven" was first published, a country lawyer in Springfield, Illinois, received a parody of that poem from a friend. He replied in part:

"April 18, 1846

"Friend Johnston:

"Your letter, written some six weeks ago, was received in due course, and also the paper with the parody. It is true, as suggested it might be, that I have never seen Poe's 'Raven,' and I very well know that a parody is almost entirely dependent for its interest upon the reader's acquaintanee with the original. . . .

"Yours truly,
A. Lincoln"

The Living Lincoln 80 (Angle & Miers ed. 1955).

it is inevitably a critique of the original and its nature as criticism is widely acknowledged.*

From the time of the Greeks, the greatest works of art and literature have been regularly burlesqued or parodied.** Homer's Iliad provoked the Battle of the Frogs and Mice (the Batrachomyomachia). The first English novel, Samuel Richardson's "Pamela: Or Virtue Rewarded" (1740), brought forth in 1741 the hilarious but penetrating "An Apology for the Life of Mrs. Shamela Andrews" by Henry Fielding. As the improvement in printing led to startling increases in the number of books published in the 19th Century, literary burlesques and parodies kept pace.*** Moreover, in nineteenth-century England nearly every important play was soon burlesqued.****

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*Dr. Frank C. Baxter of the English Department of the University of Southern California so testified at the trial [R. 144]. Kitchin's Survey of Burlesque and Parody in English (Oliver & Boyd ed. 1931), declares (p. ix) that burlesque is "a long-established mode of criticism, which is often far more incisive, and certainly more economical than the heavy review to which the public has been accustomed since the days of Dryden." Professor Falk in "American Literature in Parody," (1955), p. 13, states that "Parody is both a form of literary humor and a branch of criticism."

**There is an engaging summary of the history and tradition of parody and burlesque by Dr. Frank C. Baxter at R. 147-152; see also Kitchin, Survey of Burlesque and Parody in English (Oliver and Boyd ed. 1931); Shepperson, The Novel in Motley; A History of the Burlesque Novel in English (1936); Baddeley, Burlesque Tradition in the English Theatre (1952).

***Shepperson lists more than 100 burlesques of novels which appeared between 1830 and 1900. Shepperson, The Novel in Motley; A History of the Burlesque Novel in English (1936), Appendix.

****See Allardyce Nicoll, The History of Early Nineteenth Century Drama (1930); Allardyce Nicoll, The History of Late Nineteenth Century Drama (1946).

The 19th Century was also a high point of parody and burlesque in the United States. Bret Harte, Mark Twain, Phoebe Cary and a host of others lampooned the best of American fiction and poetry. Almost every serious play on Broadway was contemporaneously burlesqued by Weber and Fields in their Broadway Music Hall. In the 20th Century, Robert Benchley, S. J. Perelman, Corey Ford, Ogden Nash, E. B. White, Wolcott Gibbs and James Thurber have led a distinguished field of American humorists specializing in this genre. Yet despite the well established tradition of parody and burlesque, the vital issue involved here has never before been squarely presented for reported court decision in the United States or England.

II.

The Decision of the Court Below Is Clearly Wrong.

A. The Test for Infringement Adopted Below Will Stifle Parody and Burlesque.

The opinions of both courts below build on the same foundation for their conclusion that respondents can prevent petitioners from performing their parody or burlesque of the motion picture "Gaslight." Both courts hold that a parody or burlesque is to be treated no differently from an ordinary appropriation of copyrighted material and accordingly that infringement exists if there is a "substantial taking." Mechanically applying that test without any recognition of the special nature of parody and burlesque, the courts below conclude that the parody or burlesque of "Gaslight" must be enjoined because it uses more than an insubstantial amount of the copyrighted material. Under this ruling the doctrine of "fair use" is held to be inapplicable to parody and burlesque.

The ordinary plagiarism rule which the courts below would apply to parody and burlesque is highly restrictive. Copying is the basis of infringement under this rule, and, in the classic definition, "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1, 17; see *Mazer v. Stein*, 347 U. S. 201, 218. The test regularly applied by courts in the ordinary plagiarism case is whether the allegedly offending work is "recognizable by an ordinary observer as having been taken from the copyrighted source." *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. 2d 354 (9th Cir., 1947); *Kustoff v. Chaplin*, 120 F. 2d 551 (9th Cir., 1941); *Fleisher Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F. 2d 276, 278 (2nd Cir., 1934), cert. denied 294 U. S. 717. In the *Universal Pictures Co.* case, the court held that the use of even one sequence of a motion picture is an infringement. 162 F. 2d at 360. Similarly, infringement has been found where what was used was only a "small part" of a book, amounting to 300 or 400 words (*Warren v. White & Wyckoff Mfg. Co.*, 39 F. 2d 922 (S. D. N. Y. 1930), or only three sentences (*Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E. D. Pa. 1938)).

Many of the famous parodies and burlesques of history would have been held to infringe under the "ordinary observer" test. To be effective, they had to be "recognizable by an ordinary observer as having been taken from the copyrighted source." Shamela was an "outline of the important scenes and incidents in Pamela" in which only "a few of the facts" were changed.* Bret Harte used the en-

*Shepperson, The Novel in Motley; A History of the Burlesque Novel in English 23 (1936).

tire plot of Anthony Hope's "The Prisoner of Zenda," all its principal characters, and practically all its important incidents in his delightful burlesque, "Rupert the Resembler." Thackeray did the same with Dumas' "Otho the Archer." The entire story line and even much of the dialogue of Augustus Thomas' melodramatic play "Arizona" was used as the basis of the burlesque by Edgar Smith which was performed on Broadway by Weber and Fields less than two months after the play opened. Corey Ford's "Salt Water Taffy: Or, Twenty Thousand Leagues Away From the Sea" lampooned Joan Lowell's "Cradle of the Deep" chapter by chapter and incident by incident.

Thus, if the test announced by the courts below had been applicable at the time they were written, these and many other well-known parodies or burlesques could never have been published or performed. If the test be permitted to stand, the public can never again enjoy their like.

The essence of petitioner's position is that the courts below erred in lumping parody and burlesque together with uses of copyrighted material which do not constitute new and independent literary creations and are flagrant piracies. We urge that the legality of the use of a copyrighted work in the creation of a parody or burlesque should be measured by a different standard from commonplace copying.*

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*Not long after Judge Carter's decision in the instant case, an action styled *Columbia Pictures Corp. v. National Broadcasting Company*, Civil No. 16876-C, involving Sid Caesar's burlesque of the motion picture "From Here to Eternity", was also tried before him. In holding for the defendant, Judge Carter apparently receded from his opinion that a parody or burlesque must be tested by the same standard as any other appropriation, for conclusion of law No. 7 in that case states: "Since a burlesquer must make a sufficient use of the original to recall or conjure up the subject matter being

B. The Doctrine of "Fair Use" Should Be Applicable to Parody and Burlesque.

After publication, an author's only rights in his works are those granted to him by the Copyright Act. *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1, 15; see also *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 346. That Act "instead of sanctioning an existing right . . . created it." *Wheaton v. Peters*, 8 Pet. 591, 661. The power of Congress to confer such rights is limited to those which will carry out the Constitutional purpose, *i.e.*, "to promote the Progress of Science and useful Arts." Art. 1, Sec. 8; see Howell, "The Copyright Law," pp. 253, 260. The aim of the Constitutional provision is to stimulate intellectual creation, and reward to authors is of secondary importance. *Mazer v. Stein* 347 U. S. 201, 219, *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127. Consequently, the Act must always be construed in a manner consonant with such purposes; otherwise grave constitutional questions will arise. *Chamberlin v. Uris Sales Corp.*, 150 F. 2d 512 (2nd Cir., 1945); *Martinetti v. Maguire*, 16 Fed. Cas. 920 (C. C. Cal. 1867).

Reflecting the constitutional provision, courts have fashioned and applied the doctrine of "fair use" which permits the substantial use of copyrighted material for purposes which promote the progress of science and the

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burlesqued, the law permits more extensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original." See Note, 56 Col. L. Rev. 585, 602-603. The decision in that case was not appealed. However, since the Court of Appeals adopted Judge Carter's holding in the instant case, it is now the law of the Ninth Circuit that the ordinary plagiarism test must be applied to parody and burlesque, notwithstanding Judge Carter's evident doubts about his earlier holding to that effect.

useful arts.* Perhaps the best known application of the doctrine is the uniform acknowledgment that the literary critic may use substantial portions of copyrighted material in connection with his criticism.** A number of cases recognizing other types of "fair use" are set forth in the margin.*** Taken together with the literary criticism cases, they show the inaccuracy of the Court

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*In *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F. 2d 73, 85 (6th Cir., 1943) the court pointed out that "fair use" of copyrighted material is "based upon the principle that subsequent workers in the same field are not deprived of all use thereof, as, otherwise, the progress of science and the useful arts would be unduly obstructed."

**See *Folsom v. Marsh*, 9 Fed. Cas. 342, 344, No. 4901 (C. C. D. Mass. 1841); *Farmer v. Elstner*, 33 Fed. 494, 496 (C. C. Mich. 1888); *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359, 360 (S. D. N. Y. 1914).

***Karll v. Curtis Pub. Co.*, 39 F. Supp. 836 (E. D. Wis., 1941) (lyrics of the chorus of a copyrighted song written for the Green Bay Packers football team used in a magazine article about the Packers); *Broadway Music Corp. v. F-R Pub. Corp.*, 31 F. Supp. 817 (S. D. N. Y., 1940) (thirteen lines of the lyrics from the chorus of a copyrighted song popular when Pearl White was starring in "Perils of Pauline" used in a magazine article about Miss White's death); *Shapiro, Bernstein & Co. v. P. F. Collier & Co.*, 26 U. S. P. Q. 40 (D. C. N. Y., 1934) (ten lines of the lyrics from an eighteen-line chorus of a copyrighted musical comedy song used in a magazine story in which the characters heard these excerpts from the musical comedy over the radio); *Bloom & Hamlin v. Nixon*, 125 Fed. 977 (E. D. Pa., 1903) (complete chorus of a copyrighted work sung as part of an imitation of another singer who had popularized the song); *American Institute of Architects v. Fenichel*, 41 F. Supp. 146 (S. D. N. Y., 1941) (six copies of one contract form in a copyrighted bool of contract forms reproduced and distributed by an architect to certain owners and contractors with whom he was dealing); *G. Ricordi & Co. v. Mason*, 201 Fed. 182 (C. C. N. Y., 1911) (copyrighted opera libretto used to prepare a brief and fragmentary description of the plot and characters of the opera—a synopsis—which was published in a book of opera stories); *Simms v. Stanton*, 75 Fed. 6, 10-11, 17 (C. C. N. D. Cal., 1896) (same breakdown of the divisions of the subject of phrenology published in a copyrighted book used by another author who published a later book on the same subject).

of Appeals' suggestion that fair use is limited to "compilations, listings, digests and the like" [R. 283]. The rationale of the doctrine of fair use, which is as broad as the public interest in encouraging creativeness, has been epitomized by Professor Chafee as follows:

> "Nobody else should market the author's book, but we refuse to say nobody else should use it. The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if the author had a complete monopoly of everything in his book for fifty-six years or any other long period. Some use of its contents must be permitted in connection with the independent creation of other authors. The very policy which leads the law to encourage his creativeness also justifies it in facilitating the creativeness of others." Chafee, "Reflections on the Law of Copyright," 45 Col. L. Rev. 503, 511.

This principle of fair use should be applicable to parody and burlesque. To practice his art, the parodist or burlesquer *must* use a pre-existing work as a foundation from which to "take off" and create an independent work [R. 156]. The work he creates is a useful art, for it both entertains and provides a critique of the "original."*

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*The Court of Appeals is in error in indicating that we have attempted to justify use of prior works on the ground that burlesque is a branch of the art form of literary criticism [R. 284-285]. Although it is undeniable that most burlesques are by their nature critiques of the works burlesqued, the two art forms are separate and distinct. However, there is a vital point of similarity in that both *must* make substantial use of prior works to live and flourish. The literary critic's right to fair use of copyrighted material is well recognized; the author of a burlesque is entitled to the same right for the same reason.

The public interest in the preservation and encouragement of this art form requires that the author be accorded the broadest right of fair use.*

In determining whether the use by a parodist or burlesquer is a "fair use," the vital question is what has been done with what is used—whether on the one hand, the copyrighted material is used only as the necessary or appropriate ingredient for the independent creation of a bona fide parody or burlesque possessing the new and totally different literary characteristics of that art form, or on the other hand, the copyrighted material is taken *animus furandi* for the purpose of reproducing the basic literary values of the original and replacing that original before the public. The proper application of such a standard would obviate the Court of Appeals' fears that a dramatic work might be appropriated in its entirety "merely by introducing comic devices of clownish garb, or movement, or facial distortion of the actors; and presenting it as a burlesque" [R. 284]. Such a subterfuge can be recognized as an unfair use without any necessity for stifling the creation of bona fide parodies and burlesques.

Indeed, the failure of the Court of Appeals to accord parody and burlesque a right of fair use appears to stem from a misunderstanding of the nature of those arts.

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*American text writers are uniformly of the view that a bona fide parody or burlesque is a "fair use." Weil, "Copyright Law" 432 (1917); DeWolf, "Outline of Copyright Law" 97, 142 (1925); Spring, "Risks and Rights" 177, 183, 186 (1952); Lindey, "Plagiarism and Originality" 43 (1952); Ball, The Law of Copyright and Literary Property, Sec. 137 (1944); 13 Corpus Juris 1113, 1118. The District Court erroneously applied to parodies and burlesques statements of text writers regarding use of copyrighted matter in imitations or mimicry [R. 247].

This is apparent in the Court's reference to a serious dramatic work being "copied practically verbatim, and then presented with actors walking on their hands or with other grotesqueries" and other comments to the same effect [R. 284]. What the Court is describing is not a bona fide parody or burlesque, but a subterfuge in which the basic literary values of the original are pirated. The genuine burlesque uses copyrighted material to remind the audience of the mood and content of the "original," but then "it takes off into the blue. . . . It leaves out much, but it constantly comes back, so to speak, to refresh itself to [from] the original, and then takes off again" [R. 156]. The true burlesque or parody is never a substitute for the original, but rather, through transformation of the tone and key of the original, it is an independent work of art [R. 149]. It is this art form not a "wholesale copying," which is entitled to the broadest right of fair use.*

C. Under the Principles of "Fair Use," the Burlesque "Autolight" Does Not Infringe Respondents' Copyrights.

Since the courts below erroneously failed to recognize the parodist's right of fair use, the findings and conclusions that "Autolight" infringed respondents' copyrights

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*It is no bar to the right of fair use that burlesques and parodies are often produced for "commercial gain." Many of the uses cited above which courts have deemed to be fair, including literary criticism, are customarily made for commercial gain. Nor does the parodist's use of the story line of the "original" make the use unfair. See Yankwich, Parody and Burlesque in the Law of Copyright, 33 Canadian Bar. Rev. 1130, 1154 (1955). Almost invariably a criticism or a review of a book or motion picture sets forth the story line, and moreover, it has been held that a brief synopsis of an opera in a book of such synopses does not infringe the copyright in the libretto. *G. Ricordi Co. v. Mason,* 201 Fed. 182 (S. D. N. Y., 1911).

are, of course, not pertinent to the issue actually involved. The issue of whether "Autolight" was a "fair use" of "Gaslight" has yet to be tried. Proper application of the principles of fair use makes it clear, in our view, that "Autolight" does not constitute an infringement.

"Autolight" is a bona fide parody or burlesque and indeed there has been no suggestion that it is a subterfuge. The synopses set forth in Appendix A make it clear that every element of "Gaslight" used in "Autolight" was changed, inverted and transformed into a diametrically opposite set of literary values. Everything that was serious, tense and dramatic in the original became hilarious in the burlesque. The leading characters were mocked in an exaggerated and ludicrous fashion. In short, "Autolight" is a new and independent literary work.

In creating the burlesque, the authors of "Autolight" had to recall to the audience certain recognizable elements of "Gaslight," but their use was no greater than was reasonably appropriate for the accomplishment of their purpose. The burlesque neither supersedes the original nor materially reduces the demand for it. *Cf. Hill v. Whalen & Martell, Inc.*; 220 Fed. 359 (S. D. N. Y., 1914); *Karll v. Curtis Pub. Co.*, 39 F. Supp. 836, 837 (E. D. Wis., 1941). Far from being a "servile copying," "Autolight" was a creative work in an established field of art. *Cf. Simms v. Stanton*, 75 Fed. 6, 16 (C. C. N. D. Cal., 1896); *Warren v. White and Wyckoff Mfg. Co.*, 39 F. 2d 922 (S. D. N. Y., 1930). Moreover, there clearly was no intent to infringe. *Cf. Broadway Music Corp. v. F-R Pub. Corp.*, 31 F. Supp. 817, 818 (S. D. N. Y., 1940).

III.

The Question Presented Is of Far-reaching Importance.

This case presents an important issue whose determination will have a decisive influence on the future of the art of parody and burlesque. The courts below have denied the right of "fair use" to an author of a parody or burlesque and have held that a "substantial" use of a copyrighted work, which is usually essential to the creation of an effective burlesque or parody, constitutes infringement. Such a construction of the Copyright Act gives rights and creates limitations never before considered to have existed, as is evident from the unchallenged use of copyrighted material in the famous parodies and burlesques of literary history. If permitted to stand, it will have a stifling effect on parody and burlesque. Limited to use of insubstantial portions of copyrighted material and faced with litigation at every turn,* it seems clear that authors of parodies and burlesques will have no alternative but to abandon their art.

Prior to this decision, an increasingly important segment of the developing medium of television consisted of parodies and burlesques performed by such established artists as Sid Caesar, Imogene Coca, Red Skelton, Alan Young, and Jack Benny. Even more important, the ramifications of the decision below extend to all fields in which there is an established tradition of burlesquing

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*Since the District Court decision in this case, burlesques of two other motion pictures have been challenged in actions filed in the Federal District Court for the Southern District of California, Central Division. *Columbia Pictures Corp. v. National Broadcasting Co.* (burlesque by Sid Caesar entitled "From Here to Obscurity" of Columbia picture, "From Here to Eternity," see note, p. 12, *supra*); *Paramount Pictures Corp. v. National Broadcasting Co., Inc.*, No. 172-57-WM (burlesque by Imogene Coca entitled "City Girl" of Paramount picture, "Country Girl"; action now pending).

the original creation—novels, short stories, plays, poetry, non-fiction works, the graphic arts as represented by cartoons and caricatures, even music. In each of these categories the burlesquer or parodist inevitably uses substantially more of the original than he could properly use if he were creating a work of the same type as the original, and thus in each category the principle laid down will have an inhibiting effect.

In times when freedom of expression is threatened by widely divergent pressures, the ancient arts of parody and burlesque are worth preserving. The importance of those independent arts as forms of expression "is not lessened by the fact that they are designed to entertain as well as inform" or criticize. *Cf. Joseph Burstyn v. Wilson,* 343 U. S. 495, 501. "What is one man's amusement, teaches another's doctrine." *Winters v. New York,* 333 U. S. 507, 510; *Cf. Hannegan v. Esquire,* 327 U. S. 146. It will amount to a curtailment of precious rights of free expression if the principles enunciated by the courts below are allowed to stand and to handicap and restrict the future creation of parodies and burlesques.

The suggestion below [R. 256] that parody and burlesque can thrive on material in the public domain or material whose copyright holder may consent seems shallow. Limitation to public domain material would rob parodies and burlesques of the freshness and timeliness which is the key to their effectiveness and it would deprive the public of this type of critique of current originals. If E. B. White had been required to wait for the expiration of the copyright to Ernest Hemingway's "Across the River and Under the Trees," it is likely that his delightful parody titled "Across the Street and into the Grill"*

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*White, The Second Tree from the Corner 140 (1954).

would never have been written. With respect to "consented" material, there is no need to labor the point that, human nature being what it is, authors whose works most need the pin prick of parody would be the least likely to consent.

Conclusion.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Synopsis of "Gaslight."

The motion picture "Gaslight," almost two hours in length, is a suspenseful psychological drama. Its theme is that of the attempted destruction of one human being by another solely through pressure on the mind. It has three major protagonists—the husband (Gregory Anton), the wife (Paula), and the detective (Brian Cameron).

The opening scene of the picture acts as a prologue to set the sombre atmosphere of the drama. In it, Paula Alquist, as a child, is seen being taken by the kindly family solicitor through the fog-shrouded streets of London from the home in Thornton Square where her aunt has been brutally murdered by an unknown killer. In sharp contrast the scene immediately shifts to a bright and sunny Italian locale where Paula, grown into a lovely young woman, is studying singing. She has fallen in love with the charming and romantic musician, Gregory Anton, but the dimming memory of her early tragedy still so clouds her sensitive nature that she is fearful of accepting the happiness offered by his tenderness and understanding. She decides to take a trip alone in order to resolve her emotional conflict.

On the train to Lake Como her seat companion is Miss Thwaites, a garrulous English spinster, who in conversation unwittingly brings out the 10-year-old murder in Thornton Square. Paula's old fears overwhelm her, and when she is unexpectedly met at Lake Como by Gregory,

she rushes into his arms to try to find in his tender devotion the happiness she desperately needs.

Their honeymoon in the Alps is idyllic, but at its end they face the question of a permanent home. Gregory expresses a desire to live in London, and Paula, though with foreboding, agrees to return with him to the house in Thornton Square which she has inherited from her aunt. Together they inspect the gloomy old house and its contents, untouched since the murder. A single glove in a memento case and a portrait of Alice Alquist in the bejeweled costume of the Empress Theodora are given more than passing attention. Gregory maintains throughout his apparently completely sincere attitude of affection towards his wife until the discovery by Paula of a forgotten letter written to her aunt by a Sergius Bauer. At such discovery Gregory demonstrates a flash of sinister concern—the first sign that all is possibly not what is seems to be—but this is passed off by him as solicitude for his wife. However, from that moment the subtle attack on Paula's mind begins.

The next few scenes, in which the now-neighbor Miss Thwaites nosily interviews the deaf housekeeper and in which Gregory employs a sultry and impertinent housemaid (Nancy), develop the suspicion that something is amiss in the household—that perhaps Paula is ill. Nevertheless, she happily prepares for an outing with her husband to the Tower of London. Before leaving he makes her a present of a cameo brooch, stressing its sentimental value to him. On this holiday jaunt, so joyfully antic-

ipated by Paula, incidents of importance to the story occur: Paula discovers the loss of the cameo; Gregory shows a passionate interest in the crown jewels; and the audience is introduced to the handsome Brian Cameron, who coincidentally is present at the Tower. On their return to Thornton Square, Gregory adroitly turns attention to the cameo and thus "discovers" that Paula has "lost" it. At this point for the first time and after Gregory has left the house, there occurs the dramatic and chilling effect of the dimming of the gaslights, accompanied by faint noises overhead.

The play now switches to Brian, the handsome stranger, who has heretofore appeared only in the scene at the Tower of London. He and Miss Thwaites watch Paula make an attempt to leave the house, which is frustrated by an obvious inner compulsion of fear and mental turbulence. The audience still does not know of Brian's connection with the plot, but in the next scene at Scotland Yard we learn that Brian is a detective, that he is interested in Paula because of her resemblance to her murdered aunt, and that stolen and unrecovered jewels were involved in the murder.

The next scene takes place in the Anton home in which there is portrayed Gregory's quiet but merciless frustration of his wife's attempts to be helpful and his display of disdainful mock-pity towards her in the presence of the sullen, insolent Nancy. His cool composure is slightly but unmistakably upset by the attempts of Brian and Miss Thwaites to pay a call, and he makes it clear that

visitors must keep away not only from his wife, but from himself. With a dramatic change in mood, Gregory, using all his old-time charm, invites Paula to the theatre. She is exuberantly happy at being able to escape for a while from the shadows that surround her. Gregory sharply interrupts this happiness by "discovering" that a picture is missing from the wall. When she denies having touched it, he calls in the servants to prove by their solemn denials that she must have been wrong, and he intimates she is losing her mind. Without at any time departing from the characterization of Gregory as a man of outward charm and solicitude, the author has now planted firmly in the minds of his audience the fact that he is inwardly an inhumanly sadistic torturer. Any lingering doubts as to his character are dispelled by a scene in which Gregory shows a marked interest in the coarse little maid, Nancy, as he leaves the house alone. Again in Paula's room the gaslights go down and footsteps are heard above.

The next incident in the play involves a musicale at the home of Lady Dalroy. Snatching at her last opportunity to get away from the house and herself, Paula insists on attending. Gregory apparently acquiesces but makes it clear to the audience that he is merely rearranging his plans to profit from this new development. At the musicale in the midst of a large group of dignified and socially prominent people and with Brian watching, Gregory "discovers" that his watch has been taken and unspokenly accuses his wife of its theft. She breaks down

hysterically.. Rushing the mentally distraught girl home from this function, Gregory seizes the opportunity to inform her (falsely) that her mother had been mad. He compels her to believe that the few realities to which she is trying to cling, such as the discovery of the Sergius Bauer letter, have never existed except in her own mind. Again in her room after Gregory's departure, the gas-lights go down, the noises continue and her screams for help go unheeded.

Meanwhile, the detective, with the assistance of a subordinate acting as a police constable on the beat, has had Gregory under surveillance. They believe his nightly excursions have had as their destination the attic of his own house, which he has entered from another building. They have also obtained information which indicates that Gregory is planning some drastic immediate action against his wife. Cameron determines to warn her. He gains entry to the house by displaying the mate to the glove in the memento case, it having been given to him by Paula's aunt when he was a small boy. Once in Paula's presence, he gently but firmly forces her to understand that she is the victim of a terrible plot formulated by her husband and aimed against her mind. In a search of the house he forces open Gregory's desk and discovers the Bauer letter, which is one seeking an appointment with Alice Alquist just prior to her murder. He proves not only that the letter was no figment of Paula's imagination, but was in fact written by Gregory himself. Anton is Sergius Bauer. As Paula and the detective talk the

audience is shown Gregory in the attic feverishly searching for the jewels, and finally we see his discovery of them adorning the old costume of the Empress Theodora.

In the house below, Brian leaves to effect the capture of Gregory. Before he can do so, however, Gregory returns through a secret door and discovers the rifled desk. This compels him to quick action. In a scene with his wife he is able through sheer force of character imposed upon her sick mind to convince her that Brian himself was but a figment of her imagination. She is prepared to permit him to take her away when the detective returns, and the charming, diabolical murderer is captured and bound.

Gregory makes one last desperate attempt to escape. Left alone with his wife, he exercises all of his undeniable charm to induce her to free him by cutting his bonds. Instead, after an intense emotional struggle, she finally resolves her inward conflict by throwing the knife away, and, rejoicing in her final freedom from her husband's sinister control, calls for the detective to take Gregory away. The picture ends with the removal of Anton and a short scene between the detective and Paula giving some indication that happiness may possibly come to her at long last.

Synopsis of "Autolight."

The television parody or burlesque takes up 15 minutes of the half-hour Benny program. It utilizes for parody purposes only two incidents of "Gaslight"; (1) the episode with respect to the picture on the wall, and (2) the denouement of the disclosure by the detective, the capture of the husband and his final failure to induce his wife to free him. There is practically no suspense or dramatic development; the audience is simply told outright the bare bones of the story. Thus the skit opens by an announcer stating in pseudo-sepulchral tones, "The scene is the living room on the first floor of a four-story house in a gloomy and unfashionable quarter of London in the year 1871. Outwardly the atmosphere is one of peace, for even the servants are unaware that for the past weeks the master of the house has been systematically pursuing a sinister, diabolical scheme to drive his wife insane."

The single stage setting is a mock-Victorian living room. As the curtains open two maids are commenting upon the strange behavior of their mistress whose dinner is to consist of marinated salami with sour cream. Barbara Stanwyck, as "Bella," enters emoting ostentatiously. She is tormented by headaches. She is not particularly surprised at the type of food set before her, but cries desperately for her absent husband.

Enter Jack Benny, in an obvious takeoff of the suave, cold-hearted Gregory Anton. His every act, down to the exaggerated removal of his gloves finger by finger,

is a burlesque of Boyer's polished performance. To Barbara's frenzied appeal for affection he is cold. Why has she left her room? Her reason is logical—what with breakfast in bed and lunch in bed, the bed was full of dirty dishes.

Jack rings for the maid and the pull of the bell rope brings down a shower of bricks and plaster. This running "gag," used throughout the show, serves several purposes. It permits Benny to mock Boyer's nonchalance; it demonstrates the poorly built nature of the house; it lets Barbara illustrate her sanity (for later when she pulls the bell cord, she first carefully raises her umbrella), and it ultimately provides a smash conclusion.

When no one answers his summons, Jack lures Barbara into inattention, thus giving him an opportunity to rush about the room turning various pictures upside down with comic results. Having accomplished this purpose, he forthwith accuses Barbara of reversing the pictures, and declares bluntly that she is losing her mind. Her difficulty is that she either turns everything in the house upside down or does everything backward. "Yesterday when you came back from the fox hunt, you hung your riding habit in the stable and put the horse in that closet." She suggests that perhaps the butler has tampered with the picture. This presents Jack with an opportunity to ring for the butler, with the usual plaster shower result which he accepts with injured but stoic innocence.

Jeeves, the butler, proves to be Rochester, who regularly appears on the television program as Benny's colored

servant. He is dressed in a travesty of English servant-livery, knee-breeches and all, and combines exaggerated Briticisms with a Harlem accent. He is able quickly to clear himself by pointing out the absurdity of any idea that he has ever worked sufficiently to touch the furnishings. As a reward he secures a day off to go to a cricket match.

At this point Jack announces that he must leave for an appointment (unfortunately, as he admits, not a romantic one), and he does so after a kiss which Miss Stanwyck describes as "one-dimensional." This makes room for the entrance of the detective, played by Bob Crosby, Benny's orchestra leader. The detective is not only a Scotland Yard man; he doubles as a carpenter (he built the house) and is also somewhat of a magician. Barbara conveniently "mistakes" him for her husband, resulting in an amorous interlude hampered by the physical presence of Bob's carpenter-saw. This over, Bob goes directly to the point and in a few nonchalantly delivered sentences capsulizes the basic "Gaslight" plot. He tells Barbara that her husband is a jewel thief; that 10 years before he murdered a woman in this house; that he married Barbara so that he can search for the jewels; and that he is trying to drive her insane so that he can have her taken away and continue his search in the attic.*

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*If this narrative monologue which takes less than 60 seconds had been omitted, any claim that the burlesque used the "story" of "Gaslight" would have small foundation. By the same token, such omission would have made it more difficult for the audience to recall to its mind the original and would thus have seriously blunted the comic effect of the burlesque.

Jack is now heard returning. Barbara cautions Crosby to hide in a closet. The first one selected proves to be occupied—by the horse! After Bob's concealment in another closet she decides to offer him the rest of the marinated salami, but he is not there. Magically he has transformed himself to the first closet. This, he declares, is for the purpose of proving to her that she is really quite sane, and of course parodies the gentle but serious approach which Joseph Cotten makes to Miss Bergman in the picture.

Jack returns. He reiterates his accusation about his wife's proclivity for turning everything in the house upside down—the tables, the pictures, the chairs. This time she has gone too far, for the butler himself has been turned upside down and enters carrying a tray of drinks on his feet. Obviously this is only another part of Jack's cruel plot to confuse his wife. But she is now fully apprised of the facts and tells him so. Goaded to desperation the mousy Mr. Benny physically attacks the not-diminutive Miss Stanwyck, who loudly shrieks for the detective. He enters quite unperturbed by this scene of violence and is only interested in finding some rye bread to go with his salami. Urged on by Barbara, however, he finally remembers his role sufficiently to arrest Jack. He then retires to the kitchen, leaving Jack, trussed up, alone with Barbara.

The conclusion of the burlesque parodies that of the picture. Jack demands that Barbara get the knife and cut him loose. With a diabolical gleam in her eye she

announces that she intends to do just that—cut him *very* loose! In a travesty of Paula's denunciation at the close of the motion picture, Barbara declaims:

> "It was you who turned the pictures upside down; it was you who turned the lamp upside down and almost convinced me that I did it; then you turned the table upside down, the desk upside down—One day I baked an upside-down cake and you turned it rightside up!"

With the knife at the very throat of the cowering Jack, she decides that killing is too good for such a scoundrel and instead rushes to summon the detective. As she pulls the bell rope and Bob enters, practically the entire ceiling falls down on the three actors, and the curtain descends on a scene of utter chaos.

SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 96

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, and JACK BENNY,

Petitioners,

vs.

LOEW'S, INC. and PATRICK HAMILTON,

Appendix B to Petition for Writ of Certiorari, Containing Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit.

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APPENDIX B.

United States Court of Appeals for the Ninth Circuit.

Jack Benny, Appellant, v. Loew's Incorporated, a corporation, and Patrick Hamilton, Appellees. Columbia Broadcasting System, Inc., and American Tobacco Company, Appellants, v. Loew's Incorporated, a corporation, and Patrick Hamilton, Appellees. No. 14,928. Dec. 26, 1956.

Filed Dec. 31, 1956.

Upon Appeals from the United States District Court for the Southern District of California, Central Division.

Before: BONE, MCALLISTER, and CHAMBERS, Circuit Judges.

MCALLISTER, Circuit Judge:

Patrick Hamilton, an English author and a British subject, some time prior to December, 1938, conceived and wrote an original play entitled, "Gas Light." It was published and protected by copyright in February, 1939. Shortly thereafter, it was publicly performed in England, first, in Richmond, and later, in London. On December 5, 1941, it was produced as a play in New York under the name, "Angel Street," and had a successful run of 1,295 consecutive performances, extending over a period of more than 37 months.

On October 7, 1942, the exclusive motion picture rights for "Gas Light" were acquired by Loew's, Inc., better known under its trade name of Metro-Goldwyn-Mayer.

Loew's spent $2,458,000 in the production and distribution of the motion picture photoplay of "Gas Light." The actual making of the film extended over a period of more than two and a half years.

In producing the motion picture, Loew's acquired the services of three great artists in the cinema field, Charles Boyer, Ingrid Bergman, and Joseph Cotton.

The photoplay, "Gas Light," was exhibited in the United States and fifty-six foreign countries. Approximately fifty-two million persons paid admission to see it. The gross receipts in rentals for the play amounted to $4,857,000.

There is no question of the right of the dramatic work to protection under the copyright laws of both Great Britain and the United States.

On October 14, 1945, Jack Benny, a successful performer in the field of comedy, after securing Loew's consent to present a parody of "Gas Light" on radio, caused to be written, produced, performed, and broadcast over a national radio network a fifteen-minute burlesque of the play. In preparing the program, the radio writers for Benny had access to the acting script of the motion picture, "Gas Light."

More than six years later, on January 27, 1952, the Columbia Broadcasting System caused to be written and produced a half-hour long television show burlesquing "Gas Light," with Jack Benny in the leading role. It was broadcast over the Columbia Broadcasting System network and was "sponsored" by the American Tobacco Company. Neither Mr. Benny nor the Columbia Broadcasting System nor the American Tobacco Company secured consent from Loew's or Mr. Hamilton to publish and broadcast the television burlesque, or, as it is sometimes called, the parody.

Immediately after the presentation of the television show, Loew's dispatched a telegram to the Columbia

Broadcasting System, notifying that company that Loew's was the owner of the exclusive rights of production and recording of the play, "Gas Light," and adaptations thereof by means of talking films, sound tracks, and television; that Columbia had used substantial portions of the play in its television program; and that Loew's intended to to enforce its rights against infringement. A short time thereafter, counsel for Columbia replied to the above telegram, informing Loew's that its burlesque appropriation of the play, "Gas Light," was a "fair use" of the dramatic work, and that Columbia had the right to parody it as it did in the television show. Loew's in turn, informed Columbia that the burlesque television show constituted an infringement of the copyright of "Gas Light"; and when Columbia prepared for a similar presentation over several television channels, Loew's filed this action, and secured a temporary restraining order.

Upon a trial of the issues, the district court found that the Benny television play was copied in substantial part from Loew's motion picture photoplay, "Gas Light"; that the portion so copied was a substantial part of the copyrighted material in such photoplay; and that the Benny television presentation was an infringement of the copyrighted photoplay, "Gas Light." The court, accordingly, granted injunctive relief, restraining the showing of the television play, all of which appears in the able and comprehensive opinion by Judge James M. Carter, reported in 131 F. Supp. 165.

On review, the chief contention advanced by appellants is that the burlesque presentation of "Gas Light" was a "fair use" of appellees' photoplay; that, although the play was copyrighted, and neither Benny, Columbia, nor the American Tobacco Company had received any consent on

the part of the copyright owners to adapt the play in the way they did, nevertheless, they had the right to adapt the original copyrighted dramatic work of the author of the play and of the photoplay version as a burlesque, and to present, vend, and appropriate it thus, for their own profit.

Appellees submit that the Copyright Act insures to the copyright owners the exclusive right to any lawful use of their property, whereby they may get a profit out of it. They further submit that there is no doctrine of fair use which justifies the appropriation of substantial copyrighted material of a dramatic work without the consent of the copyright owner, whether such appropriation is made for the purpose of pirating the work openly, or under the guise of a burlesque or a parody.

In considering the law and its application to this case, the facts themselves are most important. The play is a remarkable dramatic production. As outlined by appellees and somewhat supplemented by the record, the play tells the story of a man who sets out upon a deliberate plan to drive his wife insane. He is motivated in this endeavor by the need of having access to a house which was inherited by his wife and in which they live. Some years prior, he had murdered the aunt of his wife for the sake of some valuable jewels which he had intended to steal, but in which he had been frustrated. His method of achieving his objective of finding the jewels without the wife's knowledge, and, at the same time, avoiding her suspicion, is to keep her attention diverted by inducing in her the belief that she is having hallucinations, suffering great lapses of memory, and gradually losing her mind. He does this by abstracting, without her knowl-

edge, articles which he had entrusted to his wife, and by removing a portrait from the wall, making her believe that she had been responsible for the misplacement of the articles and the removal of the picture, of which she had lost all recollection. He fosters such a belief in her, in part, by causing the servants to bear witness that they did not remove the portrait. The suspense aroused by the picture is focused upon whether he will succeed in his scheme of finding the jewels and driving his wife insane. He fails, because of the intervention of a detective from Scotland Yard who, suspicious of the husband's conduct, has become interested in, and then obviously enamoured, of the heroine. The detective apprehends the husband at the climax of the plot, binds him to a chair in his own home to secure his arrest, and then reveals the truth, which he has learned, to the wife. At her request, she is given an opportunity to talk to the husband, who attempts once again, through his personal charm, to subdue her to his will. She, however, resists. In this scene, at her husband's request, she procures a knife, which he has kept nearby. The suspense is heightened by the question whether she will use the knife to cut her husband's bonds, as he has asked her to do, or whether she has come to a determination to kill him. She does neither, but contents herself with denouncing him, and turning him over to the police.

A comparison of appellees' "Gas Light" and the Columbia television show discloses the following: The locale of Loew's photoplay is in the early 1870s when the story begins. In the burlesque television show, the story begins in 1871. The setting is a gloomy old four-story Victorian house. The characters are a murderer, his wife, a detective from Scotland yard, and a maid. The murderer has

killed a woman ten years before in this house. (In the Columbia television show, the time of the murder is fifteen years before.) Thereafter, the murderer marries the young girl who has inherited the house from the murdered woman, so that he can pursue his search for the jewels for which he had committed the crime. All of the foregoing is the same in the Columbia television show except that it does not mention that the wife had inherited the house.

In carrying out his objective, the husband follows the above mentioned plan of driving his wife insane, so that she may eventually be placed in an asylum. He leaves the house nightly and then secretly return through another entrance to the attic to search for the jewels. In one of the incidents, the husband questions in the presence of the wife, the maid, concerning the picture which has been removed from its place on the wall, in spite of the wife's begging the husband not to humiliate her before a servant. The maid denies having touched the picture, and the husband uses this incident also to make his wife believe that she has lost her mind. The husband is finally caught by the Scotland Yard detective, who has deduced that he is the murderer.

During the entire play, except at the climax, the wife is deeply in love with her husband and is grieved that he leaves her alone each night. Because of the husband's machinations, she fears that she is losing her mind and repeatedly begs for the sympathy and understanding of her husband, who coldly repels her. The detective from Scotland Yard, who has been noticing the husband's suspicious actions and watching the house for some time, calls on the wife when her husband is away and tells her of his past and of the murder several years previously.

In talking with the wife, the detective gets her to admit that she knows it is her husband who is prowling in the attic and making the mysterious noises there at night. Upon the return of the husband, the detective conceals himself in the house, but appears as the husband commences to bully his wife. He then places the husband under arrest, allows the wife to talk with him alone for a few minutes while he waits outside the door, and then, at her call, returns and takes him into custody. The foregoing is similar in both the photoplay and the television play.

Title 17 U. S. C. A., Section 1, provides, among other matters, that a copyright owner shall have the exclusive right to make any other version of the copyrighted work; to dramatize it, if it be a nondramatic work; to convert it into a novel or other nondramatic work, if it be a drama; to arrange or adapt it, if it be a musical work; to perform the copyrighted work publicly, if it be a drama; to make or to procure the making of any transcription or record thereof, by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever.

The district court found, as a fact, that appellants' television play was copied by them, in substantial part, from appellees' motion picture photoplay, "Gas Light," and that the "part so copied was and is a substantial part of [appellants' television] play, and of the copyrightable and copyrighted material in [appellees'] motion picture photoplay." The district court found as facts "(1) that the locale and period of the works are the same; (2) the main setting is the same; (3) the characters are generally

the same; (4) the story points are practically identical; (5) the development of the story, the treatment (except that defendants' treatment is burlesque), the incidents, the sequences of events, the points of suspense, the climax are almost identical and finally, (6) there has been a detailed borrowing of much of the dialogue with some variation in wording. There has been a substantial taking by defendants from the plaintiffs' copyrighted property." (131 F. Supp. 171.) Accordingly, the district court found that appellants were guilty of infringement of appellees' photoplay, "Gas Light."

The photoplay is an original dramatic work. It deals with incidents familiar in life and fiction, but the grouping of those incidents presents a novel arrangement of events; and it is that originality which is protected by copyright.

A comparison of the photoplay and the television play indicates how much was copied. If the material taken by appellants from "Gas Light" is eliminated, there are left only a few gags, and some disconnected and incoherent dialogue. If the television play were presented without appellants' contribution, there would be left the plot, story, principal incidents, and same sequence of events as in the photoplay.

A review of the record, a comparison of the scripts of appellees' photoplay and appellants' television play, and a viewing of the motion picture photoplay and the television play, as projected upon the screen—all convince us that the findings of fact of the district court that appellants copied the photoplay in substantial part, and that the part so copied was a substantial part of the television play and of the material in appellees' photoplay, are clearly supported by the evidence.

Appellants' chief defense is that the use which they made of appellees' photoplay in their television play was a fair use, by reason of the fact that the material which they appropriated from the motion picture, "Gas Light," was used in the creation of a burlesque, and that by reason of such circumstance, they are not guilty of infringement.

The so-called doctrine of fair use of copyrighted material appears in cases in federal courts having to do with compilations, listings, digests, and the like, and is concerned with the use made of prior compilations, listings, and digests. In certain of these cases, it is held that a writer may be guided by earlier copyrighted works, may consult original authorities, and may use those which he considers applicable in support of his own original text; but even in such cases, it is generally held that if he appropriate the fruits of another's labors, without alteration, and without independent research, he violates the rights of the copyright owner. In these instances, as has been said, there are certain to be considerable resemblances, "just as there must be between the work of two persons compiling a directory, or a dictionary, or a guide for railroad trains, or for automobile trips. In such cases the question is whether the writer has availed himself of the earlier writer's work without doing any independent work himself." Chautauqua School of Nursing v. National School of Nursing, 238 F. 151, 153 (C. C. A. 2). See also cases digested in 18 F. Dig., Copyrights, Section 55. But up to the time of the present controversy, no federal court, in any adjudication, has supposed that there was a doctrine of fair use applicable to copying the substance of a dramatic work, and presenting it, with few variations, as a burlesque. The

fact that a serious dramatic work is copied practically verbatim, and then presented with actors walking on their hands or with other grotesqueries, does not avoid infringement of the copyright. "Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support of the proposition that wholesale copying and publication of copyrighted material can *ever* be fair use." Leon v. Pacific Telephone & Telegraph Co., 91 F. 2d 484, 486 (C. C. A. 9). (Emphasis supplied.) Whether the audience is gripped with tense emotion in viewing the original drama, or, on the other hand, laughs at the burlesque, does not absolve the copier. Otherwise, any individual or corporation could appropriate, in its entirety, a serious and famous dramatic work, protected by copyright, merely by introducing comic devices of clownish garb, or movement, or facial distortion of the actors, and presenting it as burlesque. One person has the sole right to do this—the copyright owner, inasmuch as, under Title 17 U. S. C. A., Section 1, he has the exclusive right to make any other version of the work that he desires. He can have it read or sung or danced or pantomined or burlesqued, because, in the language of the statute, he has the sole right to "exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever."

The fact that it has been Mr. Benny's custom to present, from time to time, his, or the Columbia Broadcasting System's "version" of various dramatic works during the past twenty-five years, is no defense to this action for infringement of copyright. Appellants cannot copy and present another's dramatic work as they have in the instance before us, unless they receive the consent of the copyright owner.

An apparently alternative contention that the presentation of the burlesque was, in effect, literary or dramatic criticism and, therefore, not subject to an action for infringement of copyright, would seem to be a parody upon the meaning of criticism.

The record in this case includes a beguiling dissertation on the history of the drama, of English literature, of parody, and of burlesque, by Dr. Frank C. Baxter, a widely recognized and eminent authority in this field of study. Briefs of appellants' counsel, too, disclose a wealth of literary appreciation. However, there is only a single decisive point in the case: One cannot copy the substance of another's work without infringing his copyright. A burlesque presentation of such a copy is no defense to an action for infringement of copyright. As was said by the district judge, a "parodized or burlesque taking is to be treated no differently from any other appropriation; that, as in all other cases of alleged taking, the issue becomes first one of fact, i.e., what was taken and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists." (131 F. Supp. 183.)

The finding of the district court that appellants had copied a substantial part of appellees' photoplay is clearly supported by the evidence. The judgment is affirmed upon the findings of fact and conclusions of law of the district court and for the reasons set forth in the opinion of Judge James M. Carter.

(Endorsed:) Opinion. Filed Dec. 26, 1956.

Paul P. O'Brien, Clerk.

JUDGMENT.

Appeals from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(ENDORSED)

Filed and entered December 26, 1956.

PAUL P. O'BRIEN, Clerk.

IN THE

Supreme Court of the United States

October Term, 1957

No. 90

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Petitioners,

vs.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF PETITIONERS.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF PETITIONERS.

Opinions Below.

The opinion of the District Court [R. 223-274] is reported at 131 Fed. Supp. 165. The opinion of the Court of Appeals [R. 276-284] is reported at 239 F. 2d 532.

Jurisdiction.

The judgment of the Court of Appeals [R. 285] was entered on December 26, 1956. The petition for writ of certiorari was filed on March 13, 1957, and was granted on April 29, 1957 [R. 286; 353 U. S. 946]. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Statutes Involved.

Article I of the Constitution of the United States provides in pertinent part as follows:

> "Section 8. The Congress shall have Power . . . To promote the Progress of Science and useful Arts. by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

The Copyright Act, 17 U. S. C. §1, provides in pertinent part as follows:

> "§1. Exclusive rights as to copyrighted works.
>
> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> "(a) To print, reprint, publish, copy, and vend the copyrighted work;
>
> "(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;
>
> "(c) . . . to play or perform it [the copyrighted work] in public for profit, and to exhibit represent, produce, or reproduce it in any manner or by any method whatsoever . . . and
>
> "(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole

or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;"

Question Presented.

Did the court below err in holding that the doctrine of "fair use" is inapplicable to parody and burlesque, and that accordingly the author of a parody or burlesque of a copyrighted work is limited to only such insubstantial use of that work as is permitted the ordinary literary appropriator?

Statement.

This action was instituted by respondents to restrain petitioners from performing a parody or burlesque of respondents' copyrighted motion picture "Gaslight." The facts are not in dispute and were, in the main, stipulated [R. 47-75].

Prior to December 5, 1938, respondent Patrick Hamilton, a British author, wrote an original play entitled "Gas Light" which subsequently was published, performed, and protected by copyright both in England and the United States [R. 49-52]. Respondent Loew's acquired exclusive motion picture rights to the play on October 7, 1942, for $150,000, and subsequently Loew's paid screenwriters $126,691.98 to adapt the drama to the screen [R. 52-53]. Thereafter Loew's produced an original feature length (1 hour and 40 minutes) motion picture photoplay of the drama in which Charles Boyer, Ingrid Bergman and Joseph Cotten had starring roles [R. 53-54]. The photoplay which was entitled "Gaslight,"

was published with appropriate copyright notice on May 5, 1944, and thereafter it was released for national and international distribution [R. 53-54]. It was withdrawn from domestic release in November, 1946, but its international distribution still continues [R. 56]. Up to August 31, 1952, the total production and distribution cost was $2,458,275.18, its total domestic and foreign revenues were $4,857,059.92, and nearly 52 million people had seen the picture [R. 55]. While it is customary for some successful motion pictures to be reissued five or more years after their initial release, "Gaslight" has not yet been reissued [R. 56].

Since 1932, it has been the custom of the Jack Benny radio or television program to present short burlesques or parodies which poke fun at specific motion pictures and which are written especially for the program [R. 57]. Of a total of 62 motion pictures burlesqued by Benny, the evidence showed that consent was obtained from the copyright holder on 5 of the pictures and that the literary material of 12 of the pictures was in the public domain [R. 57-62].

In January, 1952, Barbara Stanwyck and Benny were featured on the Jack Benny program in a live television parody or burlesque poking fun at the motion picture "Gaslight" [R. 64]. The burlesque had been especially written (at a cost of $5,716.66) for the program, which was sponsored by petitioner The American Tobacco Company and was telecast over the television network of petitioner Columbia Broadcasting System. [R. 64-66]. Thereafter Loew's notified CBS that it had exclusive rights to the production of "Gaslight," but CBS replied that the broadcast was a parody or burlesque and in its opinion did not infringe the Loew's copyright [R. 65-67].

About May 28, 1953, CBS commenced the preparation of a filmed television playlet (approximately 15 minutes in length) entitled "Autolight" which burlesqued "Gaslight" [R. 67, 69, 70]. It was the intention of CBS to broadcast the parody or burlesque, which again starred Benny and Barbara Stanwyck, as a part of the filmed Jack Benny half-hour television program advertising Lucky Strike cigarettes, manufactured by petitioner The American Tobacco Company [R. 67-68]. On June 9, 1953, Loew's notified respondents that it considered the making of "Autolight" to be an infringement of their copyright to "Gaslight," and on June 10, Loew's filed this action [R. 68]. The District Court entered a temporary restraining order against the production or performance of the parody or burlesque [R. 68]. The order was subsequently modified to permit the filming and printing of the proposed television performance but the film was impounded pending trial of the action [R. 25-27, 68].

For the convenience of the Court, a synopsis of the motion picture "Gaslight" and the television parody "Autolight" are set forth in the Appendix, pages 1-9. Both the District Court and the Court of Appeals viewed the motion picture and the television parody [R. 283], and arrangements will be made to permit the Court to view the films if it wishes to do so.

On May 6, 1955, District Judge Carter rendered an opinion in favor of respondents herein [R. 223-274]. The court held that "parodized or burlesque taking is to be treated no differently from any other appropriation; that, as in all other cases of alleged taking, the issue becomes first one of fact, i. e., what was taken and how substantial was the taking; and if it is de-

termined that there was a substantial taking, infringement exists" [R. 252]. On this question of fact, the court concluded that "there has been a substantial taking by defendants from the plaintiff's copyrighted property" [R. 230]. The doctrine of fair use, the court indicated, does not justify any substantial use of a copyrighted work in the creation of a parody or burlesque [R. 252]. On May 20, 1955, the court entered findings of fact, conclusions of law and judgment which enjoined the performance of the filmed television program and ordered the prints thereof to be delivered up for destruction [R. 76-91].

The Court of Appeals affirmed on December 26, 1956 [R. 285]. It adopted the holding of the District Court that a "parodized or burlesque taking is to be treated no differently from any other appropriation" and "if it is determined that there was a substantial taking, infringement exists" [R. 284]. The Court of Appeals announced flatly that a burlesque presentation is "no defense to an action for infringement of copyright" and that "up to the time of the present controversy, no federal court, in any adjudication, has supposed that there was a doctrine of fair use" applicable to burlesque or parody [R. 283-284].

Summary of Argument.

I.

A. Under the copyright clause of the Constitution, the primary purpose for granting authors and publishers limited monopoly rights in the publication of their writings is "to promote the Progress of Science and useful Arts." The Copyright Act must be construed in the light of this constitutional purpose. The monopoly granted by the Act may not properly be extended to the point where its net effect is to discourage or destroy literary creativeness. Courts have always recognized this inherent limitation and have held that the copyright monopoly is not only limited in time, but in scope as well.

B. One of the limitations in scope is the judicially-established principle of fair use which denies to the copyright proprietor the right to prevent or control uses of his work which are themselves necessary or desirable to independent creativeness. An illustration (closely analogous to the case at bar) of this widely-recognized principle is the right of literary critics or reviewers to make a "fair use" of substantial amounts of protectible material in their work. While there are many types of fair use and a comprehensive definition is difficult, the unifying element is the Constitution which requires that copyright protection promote, not retard, literary creativeness.

C. The ancient and honorable art forms of parody and burlesque are entitled to the full benefit of the principle of fair use. They serve an eminently useful and desirable purpose not only because of their inherent nature as criticism, but because they provide amusement and delight. By their very nature, they require use—ordinarily a sub-

stantial use—of the contents of the works selected as the object of their satire; otherwise they cannot exist.

The lower courts have here fallen into the error of assimilating parody with plagiarism. They have applied the same restrictive rule governing the use of a copyrighted work to the burlesquer that is applied to the literary thief, and have consequently denied to parody and burlesque the necessary freedom which should be accorded them under the recognized principles of fair use. As a result, not only "Autolight," but many of the best known parodies and burlesques become illegitimate and the whole art is strait-jacketed.

D. The application of the principles of fair use to parody and burlesque fulfills the constitutional objective. It does not deprive the original author of his just reward, for "fair use" does not and should not permit a use which would allow the new work to supersede the original under the guise of parody or burlesque. At the same time the acknowledgment of the right of the parodist and burlesquer freely to produce his independent creation will stimulate and promote an important and useful art. Such an acknowledgment is in accordance with the purposes of the Act, the applicable authorities, and the unbroken custom and tradition of the art.

II.

If the doctrine of fair use is given its proper scope, petitioners' parody, "Autolight," does not infringe respondents' motion picture. It is not a substitute for nor does it supersede "Gaslight." Rather, it is a new work in a distinctive and valuable form of literature which is entitled to be fostered and encouraged.

I.

An Author's Limited Rights in His Copyrighted Work Do Not Include the Right to Prevent Fair Use of the Work in the Creation of a Bona Fide Parody or Burlesque.

Introduction.

This case breaks new ground. This Court is presented for the first time with the question whether and under what circumstances use of a copyrighted work in the creation of a parody or burlesque of the work amounts to a copyright infringement. The uniqueness of that question makes it desirable to consider briefly the nature of parody and burlesque before proceeding to the legal argument.

Parody and burlesque constitute a wide genre of literary or dramatic composition lying within the realm of comedy in which an author seizes upon some well known "original" and, through distortion, inversion, exaggeration and all the comic arts, transforms the seriousness of the original into laughter.* By definition, there must be

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*The Shorter Oxford English Dictionary defines "burlesque" as "That species of composition which excites laughter by caricature of serious works, or by ludicrous treatment of their subjects; a literary or dramatic work of this kind," and "parody" as "A composition in which the characteristic turns of thought and phrase of an author are mimicked and made to appear ridiculous, especially by applying them to ludricously inappropriate subjects." Although technical distinctions can be made between burlesque, parody, travesty, and satire, the scholars themselves have not settled upon a definition of the terms and the question presented here does not require that a differentiation be made.

Of course, any subject, either general or specific, can be burlesqued—social or national groups; institutions such as the church, a sect, or a political party; customs and manners; individual persons; and so on. The words "burlesque" and "parody" are used in this brief to refer to literary parodies or burlesques—the lampooning of particular literary works of a particular author.

an "original" to burlesque or parody and such original must be one which may be expected to be familiar to the audience of the parodist or burlesquer. Moreover, because the author produces his comic effect by stimulating mental contrast, he must cause his audience to recall clearly the mood and content of the original and especially those features which he has selected as the object of his parody. Thus he must use enough of the original (which is almost always serious or takes itself seriously) to make perfectly sure that such clear recollection will be produced, and thus that his own creative efforts will attain the desired result in the minds of his audience. Because of this essential element of mental contrast, a parody or burlesque is not simply a humorous work; it is inevitably a critique of the original, and its nature as criticism is widely acknowledged.*

From the time of the Greeks, the greatest works of art and literature have been regularly burlesqued or parodied.** Homer's Iliad provoked the Battle of the Frogs and Mice (the Batrachomyomachia). The first modern English novel, Samuel Richardson's "Pamela: Or Virtue Rewarded" (1740), brought forth in 1741 the hilarious but penetrating "An Apology for the Life of Mrs. Shamela Andrews" by Henry Fielding. Since that time, "there have been very few important novels, verses or plays that have not been burlesqued in their own time" [R. 152]. To illustrate the genre of literary parody and burlesque, we have set forth in the Appendix

*See pp. 28-29, *infra*.

**There is an engaging summary of the history and tradition of literary parody and burlesque by Dr. Frank C. Baxter at R. 147-152; see also Kitchin, Survey of Burlesque and Parody in English (Oliver and Boyd ed. 1931); Shepperson, The Novel in Motley; A History of the Burlesque Novel in English (1936); Baddeley, Burlesque Tradition in the English Theatre (1952).

the text or summaries of several well known prose parodies or burlesques, together with synopses of the "originals" which they lampooned.*

Novel questions require examination of first principles. Thus we turn initially to consider the Constitutional origins of an author's copyright.

A. The Primary Purpose of the Copyright Clause of the Constitution Is to Empower Congress to Promote the "Progress of Science and Useful Arts" for the Benefit of the Public.

The Constitution (Art. I, §8) provides that:

> "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

The striking fact about this clause is the clarity with which it shows that the primary purpose for which Congress was empowered to grant rights to authors and inventors was to encourage further writing and invention, and thus to promote the progress of such endeavors. The men of Revolutionary times were especially cognizant of the fact that the written, as well as the spoken, word molds a man's mind, and that men's minds construct their

*The short synopses in the Appendix, being necessarily limited to little more than the bare bones of the "story" involved, do not and cannot portray the real literary values of the works, for the story is usually of minor importance as far as such values are concerned. This is especially true where the work being synopsized is a parody or burlesque, since the whole charm and value of these art forms lie in the treatment alone. Nevertheless, the synopses in the Appendix may serve to show the extent to which able parodists and burlesquers customarily use the contents of the target-work in the practice of the art.

worlds. By offering encouragement to intellectual creation through the promise of some adequate reward, the new country could be assured the food for mental growth. By this clause, coupled with the right to free speech protected by the First Amendment, the inhabitants of this country could be guaranteed the full and free development and dissemination of learning, information and ideas.

The history behind the Copyright clause of the Constitution emphasizes the reasons for its adoption. It is first to be noted that prior to the Constitution and the statutes enacted pursuant to it, an American author had no rights in his literary work after publication. Under the common law, as recognized in this country an author who published his work dedicated it to the public. His rights were not comparable to those of the owner of real property or tangible personal property who was accorded a perpetual and exclusive right of future use. An author could have redress for theft of his manuscript, but his intellectual creation—once published—could be freely copied and disseminated. In *Wheaton v. Peters*, 8 Pet. 591, 663, this Court said that a perpetual and exclusive right of future publication "does not exist at common law." Speaking of the Copyright Act, the court said,

> "Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it. This seems to be the clear import of the law, connected with the circumstances under which it was enacted." 8 Pet. at 661 (p. 661).

This Court has again and again reaffirmed its statement of the status of the law prior to the Constitution and the Copyright Act of 1790. In *Banks v. Manchester*, 128 U. S. 244, 252, the Court said, "A copyright cannot be sustained as a right existing at common law." More recently,

in *Mazer v. Stein*, 347 U. S. 201, 214-15, the Court said, "Congress may after publication protect by copyright any writing of an author. Its statutes create the copyright. It did not exist at common law even though he had a property right in his unpublished work."*

The first drafts of the Constitution contained no copyright provision** but resolutions urging such a provision were soon introduced. James Madison proposed that Congress be given power "To secure to literary authors their copy rights for a limited time" and further "To encourage by premiums & provisions, the advancement of useful knowledge and discoveries."*** The proposal was referred to a Committee whose proceedings are not reported.

On September 5, 1787, the Committee reported back to the Constitutional Convention and recommended passage

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*To the same effect see American Tobacco Co. v. Werckmeister, 207 U. S. 284, 291; Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182, 188; Fox Film Corp. v. Doyal, 286 U. S. 106, 127. But see the dictum of Mr. Justice Brown in Holmes v. Hurst, 174 U. S. 82, 85.

**Journal, Acts and Proceedings of the Convention, 67-71 (1819).

***Madison, Debates in the Federal Convention of 1787 at 420 (Hunt and Scott ed. 1920); Journal, Acts and Proceedings of the Convention 260 (1819). Madison's resolution probably stems from a report to the Continental Congress by a Committee, of which he was a member, which declared that copyright protection "would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce." 24 Journals, Continental Congress 326 (1783). The Continental Congress recommended that the states pass copyright acts, and twelve of them did so. These statutes almost without exception emphasize the same purpose as the copyright clause ultimately embodied in the Constitution. See U. S. Copr. Off., Copyright Laws of the United States 1783-1952 (1953).

of the copyright clause in its present form.* The clause was adopted by the Convention without discussion. However, although illuminating debate is not available, we do know that the Convention deliberately chose a clause which emphasized that the purpose of copyright protection is to encourage and promote intellectual production and thus to benefit the public.**

In The Federalist only a paragraph is devoted to the copyright clause, probably owing to its non-controversial nature. However, in that brief treatment Madison stresses that in the copyright clause the "public good" fully coincides with the claims of individuals."***

Opinions of this Court have uniformly recognized the Constitutional purpose of promoting intellectual progress for the general welfare. Mr. Justice Jackson, speaking of the federal patent system, which is premised on the same clause of the Constitution, declared that its primary purpose "is not reward of the individual but the advancement of the arts and sciences. Its inducement is directed to disclosure of advances in knowledge which will be beneficial to society; it is not a certificate of merit, but an incentive to disclosure." *Sinclair & Carroll*

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*Journal, Acts and Proceedings of the Convention 327-329 (1819).

**Evans, Copyrgiht and the Public Interest 10 (1949), states that "the draftsmen of the copyright clause of the federal constitution had before them more than one philosophic basis for the exercise of Congressional authority in this field and . . . the choice made was deliberate . . . Whatever may be the basis of other national systems of copyright, in the United States the test both of the scope of legislative power and its application to any particular domestic situation is clearly that of the public interest . . ."

***The Federalist No. 43, at 278 (Modern Library ed. 1937).

Co. v. Interchemical Corp., 325 U. S. 327, 330-31. The copyright law, the Court has emphasized, "makes reward to the owner a secondary consideration." *United States v. Paramount Pictures*, 334 U. S. 131, 158; *Mazer v. Stein*, 347 U. S. 201, 219. Mr. Chief Justice Hughes, speaking for the Court in *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127, pointed out that the "primary object" of conferring copyrights lies in "the general benefits derived by the public from the labors of authors." The rights, he declared, are "at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects".

Nowhere, we think, have the fundamental principles which govern this case been better summarized than in the Committee Reports accompanying the Copyright Act of 1909, the last major revision of the laws. Those reports state:

> ". . . It will be seen, therefore, that the spirit of any act which Congress is authorized to pass must be one which will promote the progress of science and the useful arts, and unless it is designed to accomplish this result and is believed, in fact, to accomplish this result, it would be beyond the power of Congress.
>
> "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writ-

ings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention, to give some bonus to authors and inventors.

In enacting a copyright law Congress must consider, as has been already stated, *two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public?*"* H. Rep. No. 2222, 60th Cong. 2d Sess. (1909). Sen. Rep. No. 1108, 60th Cong., 2d Sess. (1909).

B. Consistent With the Primary Purpose of the Copyright Clause, Authors, in Creating New Works, Are Entitled to Make "Fair Use" of the Works of Other Authors.

1. A Copyright Is Limited in Accordance With the Constitutional Purpose of Stimulating the Art of Writing for the Benefit of the Public.

At the core of copyright law is the principle that the author's right in his copyrighted work is limited in accordance with the Constitutional purpose of copyright. Since copyright protection is granted under the Constitution in order to stimulate the art of writing for the benefit of the public, the rights granted to authors are limited to those which serve that purpose. If the grant of monopoly went beyond that reasonably necessary to promote the progress of science and the useful arts "it

*Italics added throughout, unless otherwise noted.

would be void", as pointed out by Judge Frank in *Chamberlin v. Uris Sales Corporation*, 150 F. 2d 512 (2d Cir., 1945), for, as was stated in *Martinetti v. Maguire*, 16 Fed. Cas. No. 9173 at 922 (C. C. D. Calif. 1867), "Congress is not empowered by the constitution to pass laws for the protection or benefit of authors and inventors, except as a means of promoting the progress of 'science and useful arts.'"

Where the Constitution expressly or impliedly declares the purpose for which legislation may be passed, statutes enacted pursuant to such delegation of power should be so construed as to be appropriate to that purpose. As this Court said in *Phelps v. United States*, 274 U. S. 341, 344:

> "Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution".

Reward to the author and inventor is imperative to encourage writing and invention. But where the reward is in the nature of a monopoly, as it is here, it must not be so extended as to defeat the very purpose of the grant. As the Court of Appeals for the District of Columbia Circuit has said in reference to inventions in *Monsanto Chemical Co. v. Coe*, 145 F. 2d 18, 20 (1944):

> "It is the duty of the Patent Office and of the courts, to see to it that the reward is not in fact so large as to violate the constitutional mandate by discouraging invention by others and thereby impeding the progress of science and the useful arts. Const. art. §8, cl. 8. Whether or not a patent will have that effect is not a theoretical inquiry; it is a highly practical one."

In order to achieve the constitutional purpose it is not sufficient that the copyright monopoly be limited only in time; it must likewise be limited in scope. If an author were to be granted the right to prevent all use of his work by others, future intellectual creation would be stifled and the public interest injured.

For that reason and regardless of the broad language of the Act the courts have never construed it as according to a copyright owner an absolute monopoly over the contents of his work. Rather, the Act has consistently been construed as granting an author rights which are strictly limited. The scope of his rights is subject to limitations falling generally into one of two equally established legal doctrines:

(1) The author is not granted the right to prevent others from using elements contained in his work which are denominated by the courts as "unprotectible". Such unprotectible material, though it may be the product solely of original, laborious and even brilliant thought on the part of the copyright owner, is nevertheless free for use by anyone else in any manner and for any purpose.

(2) The author is not granted the right to prevent others from making *certain* uses of his *protectible* material, depending upon the nature of the use which is made. This is the judicially established doctrine of "fair use".*

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*Justice Story's term "justifiable use" (Folsom v. Marsh, 9 Fed. Cas. No. 4901; at 348, (C.C. D. Mass. 1841) is certainly preferable, but "fair use" is now established by the cases as the accepted terminology.

Although these two doctrines are distinguishable by reason of the difference in the nature of the material used,* the basis for each of them is identical—the requirements of the Constitutional mandate that make paramount the promotion of science and the useful arts, with the consequent benefit to the public.

Thus with respect to the first doctrine, that of unprotectibility, an author is not granted the right to prevent others from copying or using the ideas or intellectual concepts contained in his works; no matter how novel, clever or original they may be. These elements are unprotectible. See *Holmes v. Hurst,* 174 U. S. 82; *Baker v. Selden,* 101 U. S. 101-2, per Bradley, J. Ideas are "free as air;" they are available to all authors to develop in such ways as their imaginativeness and inventiveness may make possible.** Copyright protectibility thus does not create a monopoly which is unlimited in scope, since, as stated by Judge Learned Hand, "otherwise the playwright could prevent the use of his 'ideas' to which, apart from their expression, his property is never extended."***

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*Some courts, especially the Second Circuit, have sometimes utilized the term "fair use" for both doctrines above referred to, and have thus included within the scope of the term the right to use unprotectible material. See e. g. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. 2d 49, 54 (2d Cir., 1936). It would appear to be less confusing and more in accord with the majority of the cases to confine the terminology of "fair use" to the use of copyrighted material which, except for the application of the principle, would constitute an infringement.

**Mr. Justice Brandeis, dissenting in International News Service v. Associated Press, 248 U. S. 215, at 250; London v. Biograph Co., 231 Fed. 696 (2d Cir. 1916); Shipman v. RKO Radio Pictures, Inc., 100 F. 2d 533 (2d Cir. 1938); Groppet v. Warner Bros. Pictures, Inc., 38 F. Supp. 329 (S. C. N. Y. 1941); Solomon v. RKO Radio Pictures, Inc., 44 F. Supp. 780 (S. D. N. Y. 1942).

***Nichols v. Universal Pictures Corp., 45 F. 2d 119, 121 (2d Cir. 1930).

Similarly, the theme,* situation,** and background*** are not protectible.

The reason the prohibition against copying contained in the Act does not extend to such matters is stated in *Eichel v. Marcin*, 241 Fed. 404, 408 (S. D. N. Y. 1913):

> "The object of copyright is to promote science and the useful arts. If an author, by originating a new arrangement and form of expression of certain ideas or conceptions, could withdraw these ideas or conceptions from the stock of materials to be used by other authors, each copyright would narrow the field of thought open for development and exploitation, and science, poetry, narrative, and dramatic fiction and other branches of literature would be hindered by copyright, instead of being promoted."

To extend the copyright monopoly to cover such unprotectible property would be to reward the author at the expense of the public; the statute will not be so construed.

The doctrine that the copyright monopoly never extends to "unprotectible" material was clearly recognized by the District Court in the instant case [R. 232] and is well established in decisions of the Court of Appeals

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*Shipman v. RKO Radio Pictures, Inc., 100 F. 2d 533 (2d Cir. 1938); Gropper v. Warner Bros. Pictures, Inc., 38 F. Supp. 329 (S. D. N. Y. 1941); Roe-Lawton v. Hal E. Roach Studios, 18 F. 2d 126 (S. D. Cal. 1927); Solomon v. RKO Radio Pictures, Inc., 44 F. Supp. 780 (S. D. N. Y. 1942).

**Dezendorf v. Twentieth Century-Fox Film Corp., 32 F. Supp. 359 (S. D. Cal. 1940) *aff'd.* 118 F. 2d 561 (9th Cir. 1941); Echevarria v. Warner Bros. Pictures, Inc., 12 F. Supp. 632 (S. D. Cal. 1935); Wiren v. Shubert Theatre Corp., 5 F. Supp. 358 (S. D. N. Y. 1933), *aff'd.* 70 F. 2d 1023 (2d Cir. 1934).

***Nichols v. Universal Pictures Corp., 45 F. 2d 119 (2d Cir. 1930).

for the Ninth Circuit. *Harold Lloyd Corp v. Witwer*, 65 F. 2d 1 (9th Cir. 1933); *Kustoff v. Chaplin*, 120 F. 2d 551 (9th Cir. 1941). The fundamental error in the decisions below lies in the failure to recognize that the same basic principle which applies to that doctrine applies equally to the doctrine of "fair use," *i. e.*, that the copyright holder's monopoly is limited by the paramount interest of the public in having the art of writing encouraged, and that therefore it does not encompass the right to prohibit such uses of "protectible" property as are themselves necessary or important to such encouragement.

2. An Author's Copyright Does Not Enable Him to Prevent Others From Making a "Fair Use" of His Copyrighted Work in Their New Creations.

Courts in the United States have firmly established the principle of "fair use"—the principle that under some circumstances and for some purposes, uses may freely be made of protectible material, even though use of the same material under other circumstances and for other purposes would be an infringement of the copyright. This principle is, as we have pointed out, but a reflection of the fact that the primary purpose of the copyright clause of the Constitution is to promote the progress of science and the useful arts for the benefit of the public. Thus, in *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F. 2d 73, 85 (6th Cir. 1943), the court pointed out that "fair use" of copyrighted material is "based upon the principle that subsequent workers in the same field are not deprived of all use thereof, as otherwise, the progress of science and the useful arts would be unduly obstructed."

As stated by Leon L. Yankwich, Chief Judge of the United States District Court for the Southern District of California, in an article entitled *Parody and Burlesque*

in the Law of Copyright, 33 Can. Bar Rev. 1130, 1152 (1955):

> "'Fair use' was evolved as a concept by the courts in the English-speaking world with a view to aiding the development of science and arts by allowing use of copyrighted materials despite the monopoly of copyright."

The rationale of the principle underlying the limitations on copyright exclusivity, and hence the doctrine of fair use, was epitomized by Professor Chafee as follows:

> "Nobody else should *market* the author's book, but we refuse to say nobody else should *use* it. The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if the author had a complete monopoly of everything in his book for fifty-six years or any other long period. Some use of its contents must be permitted in connection with the independent creation of other authors. The very policy which leads the law to encourage his creativeness also justifies it in facilitating the creativeness of others." (Chafee, *Reflections on the Law of Copyright*, 45 Col. L. Rev. 503, 511 (1945) (Prof. Chafee's emphasis).

A widely recognized "fair use" of a copyrighted work —and a use closely analogous to parody and burlesque— is that made in literary criticism. In an early case, Mr. Justice Story, sitting as Circuit Justice, said:

> ". . . no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for

> the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy." *Folsom v. Marsh*, 9 Fed. Cas. No. 4901 at 344 (C. C. D. Mass. 1841).

The opinion of Mr. Justice Clifford, sitting as Circuit Justice in *Lawrence v. Dana*, 15 Fed. Cas. No. 8136 at 61 (C. C. D. Mass. 1869), refers to the "privilege of a subsequent writer to make what is called a fair use of a prior publication" and emphasizes a critic's right to make substantial extracts from a copyrighted work:

> "Reviewers may make extracts sufficient to show the merits or demerits of the work, but they cannot so exercise the privilege as to supersede the original book. Sufficient may be taken to give a correct view of the whole; but the privilege of making extracts is limited to those objects, and cannot be exercised to such an extent that the review shall become a substitute for the book reviewed. . . ."

Farmer v. Elstner, 33 Fed. 494, 496 (C. C. E. D. Mich. 1888), likewise asserts a reviewer's broad right to make extracts for the purposes of criticism "so long as such extracts are not made as a cover for a republication." See also *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359, 360 (S. D. N. Y. 1914).*

A characteristic application of the principle of fair use enables authors of learned or technical works to use the copyrighted material from books on the same subject.

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*In West Pub. Co. v. Edward Thompson Co., 176 Fed. 833, 838 (2d Cir. 1910), the court said that reprinting one or more copyrighted poems in a textbook on literature would be a fair use.

In *Simms v. Stanton*, 75 Fed. 6 (C. C. N. D. Cal. 1896), the court held "fair" the use in a book on physiognomy of a large quantity of material, including the topical divisions, from a prior book on the subject. Similarly, it was held "fair use" for the authors of law textbooks to make use of lists of citations contained in an earlier law encyclopedia. *Edward Thompson Co. v. American Law Book Co.*, 122 Fed. 922 (2d Cir., 1903).* Akin to this decision is the holding that there was no infringement where portions of a book of forms copyrighted by the American Institute of Architects were copied by an architect and distributed to his clients. *American Institute of Architects v. Fenichel*, 41 Fed. Supp. 146 (S. D. N. Y. 1941).

The use of copyrighted material for purposes of illustration is another important application of the principle of fair use. It was held a "fair use" for the New Yorker Magazine, in a "Talk of the Town" piece marking the death of Pearl White, to quote 13 lines from a song associated with Miss White's role in the "Perils of Pauline." *Broadway Music Corp. v. F-R Pub. Corp.*, 31 Fed. Supp. 817 (S. D. N. Y. 1940).* Similarly, quota-

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*The court emphasized that ". . . If it be held that an author cannot consult the authorities collected by his predecessors, the law of copyright, enacted to promote the progress of science and useful arts, will retard that progress." 122 Fed. at 923.

*The New Yorker piece read:

"The death of Pearl White in Paris made us think of a song everybody sang when we were thirteen and 'The Perils of Pauline' was being shown every week at the Nemo Theater, on Broadway and 110th Street. As nearly as we can remember it, the chorus went: [thirteen lines of the chorus were printed] We forget the rest. As 1940 creeps on, it often seems to us

tion in a Saturday Evening Post article of the lyrics of a song written for the Green Bay Packers football team was a "fair use." *Karll v. Curtis Pub. Co.*, 39 Fed. Supp. 836 (E. D. Wis. 1941). Again, the use in a J. P. McEvoy story in Colliers of ten lines of a copyrighted song in the form of what characters in the story hear over the radio is a "fair use." *Shapiro, Bernstein & Co. v. P. F. Collier & Son*, 26 U. S. P. Q. 40 (S. D. N. Y. 1934).

Early English law also accorded recognition to the principle of "fair use." In 1802, Lord Ellenborough enunciated the principle in *Cary v. Kearsley*, 170 Eng. Rep. 679, 680:

> "That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action: a man may fairly adopt part of the work of another; he may so make use of another's labours for the promotion of science, and the benefit of the public: but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term the *animus furandi?* . . ."

In *Bell v. Whitehead*, 8 L. J. 141 (1839), Lord Cottenham held that, for purposes of criticism, the Railway Times could print a substantial extract from a copyrighted article by Dr. Lardner which appeared in the Monthly

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that we have forgotten practically everything of any importance." 31 Fed. at 818.

The public interest is indicated by the court's statement:

> "True the defendant could very well have commented on the passing of Pearl White without any use of this song, and no doubt reference to the song made the article more attractive, but the whole news article, with the song included, was nothing more than an epitaph for the dead actress, an epitaph that would be recalled by thousands of Americans." *Ibid.*

Chronicle on the velocity attainable on railways.* Similarly, in *Sayre v. Moore,* quoted in *Cary v. Longman,* 102 Eng. Rep. 138, 139 n. (1801), Lord Mansfield held that a publisher of a chart could "take advantage of all prior publications" so long as the chart he produces is not a "servile imitation."

Respondents have heretofore contended that the right of fair use is dependent upon the implied consent of the author or the copyright proprietor. A moment's reflection will dispel that notion. If that were so, then any author could prevent or limit any quotation or other use of his work for purposes of exemplification, criticism, review or otherwise, by a simple "notice of non-consent". But the right to make such a use exists even though the criticism or review is highly unfavorable.** *Hill v. Whalen & Martell, Inc.,* 220 Fed. 359 (S. D. N. Y. 1914); See Spring, *Risks and Rights* 180 (1952). The fact is that this author simply never acquires the right to prevent the use of his work as a basis for a critical review.

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*The opinion states:

". . . This extract was clearly inserted for the purpose of criticism. The defendants publish the observations of Dr. Lardner, and also comments thereon, and that was the course followed in *Whittingham v. Wooler*, where the decision was in favour of such extracts being allowed to be made: large extracts, moreover, from works, are constantly given in the *Edinburgh* and *Quarterly Reviews*, not for the purpose of rendering it unnecesary for the public to purchase the works reviewed by those periodicals, or of superseding the works themselves, but of explaining their criticisms on the works." 8 L. J. at 142.

**"A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright." 220 Fed. at 360.

The wide diversity in the "fair use" cases set forth above* shows the inaccuracy of the Court of Appeals' suggestion that fair use is limited to "compilations, listings, digests and the like" [R. 282]. Indeed, the types of fair use are so varied that no one definition fits them all. However, the unifying element is the Constitution which requires that the copyright monopoly leave ample room for the dissemination of knowledge and the promotion of the useful arts. Under this mandate, it is submitted that the principle of fair use is as broad as the public interest in encouraging creativeness.

C. An Author of a Burlesque or Parody Is Entitled to Use Copyrighted Works in Accordance With the Principles of Fair Use.

The court below held that "parodized or burlesque taking is to be treated no differently from any other appropriation," announcing flatly that a burlesque presentation is "no defense to an action for infringement of copyright" [R. 284]. The court thus refused to recognize that the author of a burlesque or parody has a right to make a "fair use" of copyrighted material, stating that "up to the time of the present controversy, no federal court, in any adjudication, has supposed that there was a doctrine of fair use" applicable to parody or burlesque [R. 283]. This failure to apply the principles which are basic to copyright, and have generated the doctrine of fair use is the fundamental error of the decision below. Such a result, as we shall show, ignores the nature of

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*An exhaustive collection of American cases on "fair use" may be found in Cohen, *Fair Use in the Law of Copyright* 6 ASCAP Copyright Law Symposium 43 (1955).

parody and burlesque and completely overlooks the primary purpose of the copyright clause of the Constitution.

1. Parody and Burlesque Constitute a Useful and Significant Art.

It is clear that the literary art form of parody and burlesque is a "useful art" within the meaning of the Constitution. It has a history going back to the dawn of literature and is a recognized and respected form of Greek writing and drama [R. 116-117]. With the invention of printing and the subsequent advent of the novel and resurgence of the drama it was revivified and revitalized.* Such important figures in literature as Fielding, Thackeray, Jane Austin, Bret Harte and James M. Barrie were all active in this field.

It is inherent in the nature of burlesque and parody that they constitute a form of criticism. Dr. Frank C. Baxter of the English Department of the University of Southern California so testified at the trial [R. 144-145]. Kitchin's "Survey of Burlesque and Parody in English" (Oliver & Boyd ed. 1931), declares (p. 9) that burlesque is "a long-established mode of criticism, which is often far more incisive, and certainly more economical than the heavy review to which the public has been accustomed since the days of Dryden". Aldous Huxley

*Hamilton's six volume collection of "Parodies of the Works of English and American Authors," published in 1885, contains several thousand parodies, most of them poetic. Shepherson's "Novel in Motley" contains a list of over 100 parodies or burlesques of 19th Century novels.

in "Point Counterpoint" says "Parodies and caricatures are the most penetrating of criticisms" (Chap. 28). Professor Robert Falk in "American Literature in Parody" (1955) (p. 13) states that "Parody is both a form of literary humor and a branch of criticism".

Burlesque and parody play the critic by inviting comparison and inducing appraisal. The original which is solemn or banal or vulgar may be more effectively brought to book by a parody or burlesque which gives the events in the original a gentle but decisive push to absurdity. There was, for example, no more incisive criticism of Joan Lowell's "Cradle of the Deep" than Corey Ford's "Salt Water Taffy" (App. p. 21). Nor could the unconscious hypocrisy of Samuel Richardson's "Pamela" have been more acutely exposed than by Sir Henry Fielding's "Shamela" (App. p. 50). Even where criticism is not a paramount purpose, the result of a good parody or burlesque is to cause the thoughtful audience to make some challenge of its pre-existing judgments upon the original.

The fact that it is written to amuse does not at all lessen the importance or usefulness of this art form. *Cf. Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 501. "What is one man's amusement, teaches another's doctrine." *Winters v. New York*, 333 U. S. 507, 510. *Cf. Hannegan v. Esquire, Inc.*, 327 U. S. 146; *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239. The world would be a poorer place were it to be deprived of the delightful poems in Louis Carroll's "Alice in Wonderland", most

of which are extremely close parodies.* In times when freedom of expression is threatened by widely divergent pressures, the ancient arts of parody and burlesque are well worth preserving.

2. Use of a Pre-existing Work Is Indispensable to Parody or Burlesque.

To exist, parody and burlesque must have one essential prerequisite: Like literary criticism, they must use a pre-existing work. In this respect they differ from other forms of art such as the general fields of poetry, novel or drama. The copyright owner has the exclusive right to dramatize his novel or to translate it into a radio play, television play or musical comedy, because such protection does not interfere with the public interest. The prohibition against another author's using any particular book or play for such translation does not substantially narrow the field of intellectual creation; such other author can draw upon his own imagination to create his own novel or play. By definition, however, he cannot create a parody or burlesque of a particular work unless he does use particular recognizable elements of the work burlesqued. Such use is an absolute requisite if the art is to survive.

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*The familiar "You are old, father William" is a comic facsimile of poet laureate Robert Southey's highly moral poem, "The Old Man's Comforts, and How He Gained Them." Southey's poem consists of three inquiries by a young man to his pious father, each answered by sage examples. The first and each alternate verse begin "'You are old, father William,' the young man cried," and each answering verse begins "'In the days of my youth,' father William replied." Carroll used not only the "plot," the thought, the form, and the style of the original, but actually many of the very words. Had any other serious poet used as much of Southey's poem for a similar poem, we think there could have been no question but that it would be a "substantial taking" under the rule applied here by the lower courts.

This does not mean that the parodist is a plagiarist. The differences are marked and vital.

In the first place, the plagiarist takes material from the original *in order to adopt it as his own.* He may make subtle changes and additions to hide his theft, but his intent is to claim as his the finished product in its entirety. He thus acts, consciously or subconsciously, *animo furandi.*

The parodist, on the other hand, emphasizes and re-emphasizes that the facets of the original which he has selected and used for the purpose of parodying them are *not* his own. He calls attention in every conceivable way to the fact that those facets are the concepts of the author who is his target—by reminiscent title or character names, by the use of the same basic incidents and sequence of incidents, by broad imitation of style and mannerisms, and by any other available device. That is the very essence of his art. He wants and expects his audience to be somewhat familiar with the original, and he uses every means to recall to their minds its content, and then proceeds by his originality and ability to show what can be done with that recalled image to cause the audience itself mentally to transform the original mood and effect into something new and different. Thus, the parodist or burlesquer in fact "takes" nothing; he *uses* the original solely as the acknowledged and necessary ingredient to create his own unique and wholly different art form.

Furthermore, the plagiarist purveys to his audience the values of the original as such. Artfully or inartfully disguised, he palms them off; thus, to that extent he supersedes the original and robs its author of his reward.

Their usefulness for this purpose is the reason for his selecting them. The parodist never purports to purvey the values of the original as his values. On the contrary, the values he creates are diametrically different values. They arise not at all from what he uses, but with what he does with what he uses. They neither substitute for nor supersede the original; if they do, then the parodist has become a plagiarist.

3. The Test for Infringement Adopted Below Would Stifle Parody and Burlesque.

The courts below applied the same test to the parodist as is customarily applied to the plagiarist, *i. e.*, that of determining nothing more than whether what was taken was "substantial", declaring that "if it is determined that there was a substantial taking, infringement exists" [R. 252, 284]. There can be no doubt but that this correctly states the established test for literary plagiarism. *Dymow v. Bolton*, 11 F. 2d 690 (2d Cir. 1926); *Caruthers v. R.K.O. Radio Pictures*, 20 Fed. Supp. 906 (S. D. N. Y. 1937).

Such a rule is highly restrictive, as it ought to be where the gravamen of the charge is that one author has deliberately plagiarized the work of another. Under it "copying" is the basis of infringement. The standard regularly applied by courts in the ordinary plagiarism case is whether the allegedly offending work is "recognizable by an ordinary observer as having been taken from the copyrighted source." *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F. 2d 276, 278 (2d Cir. 1934), *cert. den.* 294 U. S. 717; *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. 2d 354, 361 (9th Cir. 1947); *Kustoff v. Chaplin*, 120 F. 2d 551, 560 (9th Cir. 1941).

Furthermore, under the rule applicable to ordinary plagiarism and adopted below, the "substantiality" of the taking is measured practically by *de minimis* standards. "Its unauthorized appropriation is not to be neutralized on the plea that 'it is such a little one'". *Chicago Record-Herald Co. v. Tribune Assn.*, 275 Fed. 797, 799 (7th Cir. 1921). In the *Universal Pictures Co.* case, the court held that the use of one sequence of a motion picture is an infringement. 162 F. 2d at 360. In *Daly v. Palmer*, 6 Fed. Cas. No. 3552 (C. C. S. D. N. Y., 1868), *affirmed sub. nom. Brady v. Daly*, 83 Fed. 1007 (2d Cir. 1897), the plagiaristic use of one incident taken from the end of the third scene of the fourth act of a play was held actionable.* In *Chappell & Co. v. Fields*, 210 Fed. 864 (2d Cir. 1914), the portion plagiarized also consisted of only one short scene from one act of a play, the balance of the play being entirely different. In *De Acosta v. Brown*, 146 F. 2d 408 (2d Cir. 1944), a biography of Clara Barton was held to infringe another on the same subject because a fictitious early romance appears in both. The court said that, "The fact that the matter involved concerned only a small and an early part of Clara Barton's life and only a portion of defendant Brown's book may affect the amount of recovery, but does not prevent liability". *Id.*, at 410. Similarly, infringement has been found where what was used was only a "small part" of a book, amounting to 300 or 400 words (*Warren v. White & Wyckoff Mfg. Co.*, 39 F. 2d 922 (S. D. N. Y. 1930), or only three sentences (*Henry Holt*

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*This incident was the now familiar but then novel one which placed the heroine, bound and tied by the villain, upon the track of a railroad from which she is rescued in the nick of time by the hero.

& Co. v. Liggett & Myers Tobacco Co., 23 Fed. Supp. 302 (E. D. Pa. 1938)).

Many of the famous parodies and burlesques of literature would certainly have been held to infringe under the plagiarism test of "substantial" taking. To be effective a parody or burlesque *must* be "recognizable by an ordinary observer as having been taken from the copyrighted source."* As a consequence the parodist ordinarily must use "substantial" material from the original, as that term is used in the plagiarism cases. "Shamela" was an "outline of the important scenes and incidents in Pamela" in which only "a few of the facts" were changed.** Bret Harte used the entire plot of Anthony

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*This is not a requirement imposed by some abstruse scholar. About a year after Poe's "The Raven" was first published, a country lawyer in Springfield, Illinois, received a parody of that poem from a friend. He replied in part:

"April 18, 1846

"Friend Johnston:

"Your letter, written some six weeks ago, was received in due course, and also the paper with the parody. It is true, as suggested it might be, that I have never seen Poe's 'Raven,' and I very well know that a parody is almost entirely dependent for its interest upon the reader's acquaintance with the original. . . .

"Yours truly,
A. Lincoln"

The Living Lincoln 86 (Angle & Miers ed. 1955).

**Shepperson, "The Novel in Motley; A History of the Burlesque Novel in English 23 (1936). Sheridan W. Baker's preface to an edition of "Shamela" published in 1953 states:

"Even where Fielding seems to be extemporizing most freely in his own vein he is following Richardson. . . . Fielding reduces Richardson's two volumes to half a hundred pages, pinning scenes together with details from here and there (examine Shamela's relationship with Mrs. Jewkes), and yet following Richardson's contours exactly. Few parodies—in verse or prose—can come near *Shamela* in its sustained and persistent mimicry." ("An Apology for the Life of Mrs. Shamela Andrews," pp. xxxi-xxxii (Baker ed. 1953).)

Hope's "The Prisoner of Zenda", all its principal characters, and practically all its important incidents in his delightful burlesque, "Rupert the Resembler." Thackeray did the same with Dumas' "Otho the Archer." The entire story line and even much of the dialogue of Augustus Thomas' melodramatic play "Arizona" was used as the basis of the burlesque by Edgar Smith which was performed on Broadway by Weber and Fields less than two months after the original play opened. Corey Ford's "Salt Water Taffy: Or, Twenty Thousand Leagues Away From the Sea" lampooned Joan Lowell's "Cradle of the Deep" chapter by chapter and incident by incident [see Appendix; also Exs. 12, 13, 16, 17].

The suggestion of the District Court [R. 256] that parody and burlesque can thrive on material in the public domain or material to whose use the copyright holder may consent seems shallow. Limitation to public domain material would rob parodies and burlesques of the freshness and timeliness which is the key to their effectiveness and it would deprive the public of this type of critique of current originals. If Cornelia Otis Skinner had been required to wait for the expiration of the copyright to Ernest Hemingway's "For Whom the Bell Tolls," it is likely that her delightful parody titled "For Whom the Gong Sounds" (App. p. 12) would never have been written. With respect to "consented" material, there is no need to labor the point that, human nature being what it is, authors whose works most need the pin prick of parody would be the least likely to consent.

4. The Principles of Fair Use Should Be Applicable to Parody and Burlesque.

To uphold the rule adopted by the courts below would violate the primary purpose of the copyright clause of

the Constitution. As we have shown, parody and burlesque constitute useful arts whose preservation is in the public interest. The Constitution requires that the copyright laws be interpreted so as to facilitate and encourage such independent, useful arts. In short, the copyright laws must be interpreted so as to permit authors to use copyrighted works to the full extent necessary to create valid parodies and burlesques of such works.

The cases cited at pages 21-27 *supra* establish that, where it is necessary or highly desirable to make certain substantial uses of protectible copyrighted material in order to promote the progress of science and the useful arts, such uses may be made under the doctrine of "fair use." Especially relevant are the literary criticism cases (pp. 22-23; 25-26 *supra*) where the courts have recognized that reviewers and critics must make a substantial use of the original in order to perform their important function. Similarly the Court here should recognize that it is essential that the authors of parodies and burlesque be permitted to make a fair use of copyrighted works in performing their important function and in creating their independent works. "A different approach would limit not only creation, but the very development of literature, arts and sciences". Yankwich, Parody and Burlesque in the Law of Copyright, 33 Can. Bar Rev. 1130, 1132 (1955).*

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*"Because from the very inception of literary history . . . parody and burlesque have been recognized as independent intellectual creations, we should not destroy them through judicial fiat by applying to them tests which fail to take into account this historical fact. Rather should we encourage those endowed with and practising the comic spirit to continue, in the words of Joseph Addison, to draw persons or characters 'quite unlike themselves.'" (*Id.* at 1154.)

A number of factors unite to show that the principle of fair use, rather than the rules applicable to ordinary literary plagiarism, should be applicable to parody and burlesque. Although some of these factors are referred to elsewhere in the brief, it is appropriate to summarize them here:

(a) A parody or burlesque is a "new thing", a new intellectual creation in a wholly different *genre*, ordinarily requiring for its production talents and skills quite unrelated to those possessed by the author of the original.

(b) The use of a copyrighted work is essential, in the nature of things, for the creation of a parody or burlesque of that work.

(c) A parody or burlesque both entertains and amounts to a critique, and there is a strong public interest in preserving and encouraging this useful art.

(d) Parody and burlesque are a well-established tradition and all interested persons have acquiesced in the custom for centuries.

(e) The plagiarist tries in every way to disguise the fact that he has stolen from another author, but the whole purpose of the author of a parody or burlesque is to impress upon his audience the fact that he has used the original, and that whatever of the original may appear in his work is by no means to be confused with what he himself has created.

(f) The purpose of the plagiarist is to enhance the value of his work (to get a "free ride") through the use of the creative values contained in the work

> from which he steals. The parodist, on the other hand, discards the intrinsic values of the original by his very act of parodying; he relies on the fact that the original is well known, but he has no interest in appropriating, nor does he appropriate, its literary values.

It is no bar to the right of fair use that the burlesque or parody is produced for "commercial gain." We believe that the trial court demonstrably erred in placing so much weight on that factor [R. 236-240]. Like most literary criticism (which unquestionably has the right of fair use), burlesque and parodies of course are written for "commercial gain." They always have been. Even the Greeks contended for the crowns of laurel which meant financial success. As the Court of Appeals for the Ninth Circuit said in *Warner Bros. Pictures, Inc., v. Columbia Broadcasting System*, 216 F. 2d 945, 950 (195..), "Authors work for the love of their art no more than other professional people work in other lines of work for the love of it. There is the financial motive as well."*

The circumstance that television may be a potent competitor to motion pictures for the nation's entertainment audience does not affect the application to parody or burlesque of the principles of fair use. The same interest

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*A "commercial gain" test would make infringement depend wholly on the sale—even the salability—of the particular parody or burlesque rather than on its intendment, its nature or its content. A parody printed in the "Saturday Evening Post" for compensation would infringe; the same parody published by the author at his own expense and distributed without charge would not. This, despite the fact that the Copyright Act deliberately omits the "for profit" qualification as a requirement to establish infringement in the case of books, poems or plays [R. 236].

protects the right of the public to view these useful creations at home as protects its right to see them on the stage or to buy them at the book store. Certainly the advent of television did not have the effect of enlarging the author's monopoly under the Copyright Act so as to permit him to prohibit or control an art previously unfettered.*

There is also no merit in the suggestion below [R. 283] that a parody or burlesque is an "other version" which the copyright owner has an exclusive right to make under Section 1(b) of the Copyright Act. The words "other version" received their first construction in *Ricordi Co. v. Mason,* 201 Fed. 184 (S. D. N. Y. 1912), where the court held that a synopsis of a copyrighted opera in a book of synopses did not constitute an infringement. The court, in denying complaint's theory that such a synopsis was another version, said:

> "A literal definition of the words 'make any other version thereof' would not only include the defendant's publication, but also the newspaper publication, after performance, of any reviews or criticism, . . ." *Id.* at 185.

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*Burlesque and parody are distinguishable from the type of commercial use proscribed in Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302 (E. D. Pa. 1938). There, in a pamphlet advertising Chesterfield cigarettes, the tobacco company included a quotation from a copyrighted scientific treatise in a manner which made it appear that the author of the treatise had consented to the use of his work for advertising purposes. Its use by the tobacco company was not necessary to promote the progress of science or the useful arts as is the case when parody or burlesque uses the burlesqued or parodied work. No attempt was made to use the treatise as a springboard for creating something new in science or art. The use was simply an unauthorized copying of copyrighted material under circumstances and in a manner which afforded no justification for the use.

And the Court of Appeals, in affirming *per curiam,* said:

> "We are clearly of the opinion that these extremely brief epitomes of the plots of the two operas, . . . are neither of them in any true sense 'a version' of the copyrighted work, as that word is used in the statute." 210 Fed. 277 (2d Cir. 1913).

It seems clear that a parody or burlesque which is a new intellectual creation is not an "other version" as that phrase is used in the statute. See *Corcoran v. Montgomery Ward & Co., Inc.,* 121 F. 2d 572, 573 (9th Cir. 1941).

5. Application of the Principle of Fair Use to Burlesque and Parody Is Consistent With the Authorities.

While the issue presented in this case has never been the subject of a square decision by any court, the authorities which have discussed the problem support the application of the principle of fair use to parody and burlesque.

The English cases. In *Glyn v. Western Features Film Co., Ltd.,* 1 Ch. 261, 114 L. T. Rep. 354 (1916), the author of the somewhat notorious "Three Weeks," Eleanor Glyn, brought a copyright infringement action against the defendant who had produced a motion picture entitled "Pimple's Three Weeks (without the Option)," which included a burlesque of some of the incidents in the book. One of the defenses was that the film "is a mere burlesque of the plaintiff's novel, and that a genuine burlesque of a serious work constitutes no infringement of copyright". The case was decided upon the ground that the plaintiff's work was so immoral as not to be entitled to copyright protection, but the court referred to the burlesque defense as follows:

> "Making all allowance for the fact that prior to the Act of 1911 literary copyright did not include the acting right, it certainly is remarkable that no case can be found in the books in which a burlesque

even of a play has been treated as an infringement of copyright, although burlesque, frequently more distinguished than the thing burlesqued, is as old as Aristophanes, to take Mr. Hartree's example. It may well be that as far as English law is concerned one reason for this striking state of things is that the older cases insist upon the necessity of establishing that the alleged piracy is calculated to prejudice the sale or diminish the profits or supersede the objects of the original work, whereas it is well known that a burlesque is usually the best possible advertisement of the original and has often made famous a work which would otherwise have remained in obscurity. More probably, however, the reason is to be found involved in such observations as those of Lindley L. J. in *Hanfstaengl v. Empire Palace,** or in such a decision as that of the Court of Appeal in *Francis, Day & Hunter v. Feldman & Co.,*** or in the principle that no infringment of the plaintiff's rights takes place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result. . . ." 1 Ch. (1916) at 268, 114 L. T. Rep. at 356.

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*In Hanfstaengl v. Empire Palace, Ltd., 70 L. T. Rep. N. S. 854 (1894), the defendant had printed drawings in its newspaper of living tableaux depicted on the stage of a theatre, which tableaux were in turn representations of copyrighted pictures. All the judges treated the case as if the drawings had been made directly from a view of the pictures themselves. Lindley, L. J., after pointing out that fair reviews of literary works may properly contain lengthy extracts from the original, held that the sketches did not constitute infringement because they were "rough sketches, made for a very different purpose and answering a very different purpose." *Id.* at 86.

**In Francis, Day & Hunter v. Feldman & Co., 2 Ch. 728, 83 L. J. 906 (1914), a parody (entitled, "You didn't want to do it—but you did") of "You Made Me Love You—I Didn't Want to Do It," was held not to infringe the copyrighted song, but the court did not discuss the question of parody as a fair use.

The other English case on burlesque is *Carlton v. Mortimer*, which apparently is reported only in MacGillivray, Copyright Cases, 1917-23 at 194 (1924). In that case, the owners of the dramatic rights in a book entitled "Tarzan of the Apes" claimed infringement by reason of a comic acrobatic performance under the title of "Warzan and his Apes," which used two incidents from the book. The court held (in MacGillivray's words):

> ". . . In the book both these features were serious, perhaps they might be described as sentimental. In the defendant's performance they were both comic to the last degree. They were intended to be comic and produce nothing but laughter. So far as these incidents might be said to be taken from the book, he was satisfied that they were a mere burlesque of these incidents. Without going to the extent to which he understood Mr. Justice Younger went into the case of *Glyn v. Western Feature Film Co.*, [1916] 1 Ch. 261, in saying that a burlesque never can be an infringement of copyright, he was of the opinion that the burlesquing of these two trifling incidents and the production of the performance under a title which was somewhat similar in sound to, but yet different in fact from, the title of the novel did not amount to an infringement of the plaintiff's rights. . . ." *Id.* at 195-6.

The American cases. Prior to the instant case, the only decision in the United States which involved burlesque or parody was *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359 (S. D. N. Y. 1914). There the plaintiff was the exclusive licensee of the dramatic rights to the well known cartoon "Mutt and Jeff." Defendant produced a dramatic performance entitled "In Cartoonland" in which he introduced characters called "Nutt" and "Giff", who were

costumed exactly like the cartoon characters and whose actions and speech were in harmony with the spirit of the cartoons. It was as palpable a steal as could be imagined. See discussion of the case in *King Features Syndicate v. Fleischer*, 299 Fed. 533, 536 (2d Cir., 1924). Defendant in the *Hill* case had the temerity to claim his use was a "burlesque," perhaps referring to the type of theatre in which it was performed. The court properly denied his claim, emphasizing in its opinion that the defendant's characters Nutt and Giff would be a substitute for Mutt and Jeff:

> ". . . Those who saw 'Nutt' and 'Giff' would have less keen a desire to see 'Mutt' and 'Jeff'. . . . A good many of them would probably think that they had already seen those characters. They would not be far wrong in so thinking. . . ." 220 Fed. at 360.

The court, however, reaffirmed the general principle of fair use, as follows:

> "A copyrighted work is subject to fair criticism, serious or humorous. So far as is necessary to that end, quotations may be made from it, and it may be described by words, representations, pictures, or suggestions. . . ." *Ibid.*

The trial judge in the instant case discussed three early American cases involving mimicry by a performing actor [R. 241-243]. In *Bloom & Hamlin v. Nixon*, 125 Fed. 977 (E. D. Pa. 1903), the singing verbatim of the complete chorus of a popular song as a part of an imitation of another singer was held a fair use. The same decision was given in *Green v. Minzensheimer*, 177 Fed. 286 (S. D. N. Y. 1909), where one verse and a chorus was sung. On the other hand, in *Green v. Luby*, 177 Fed.

287 (S. D. N. Y. 1909), the whole song was used in connection with the imitation of another singer, and it was held not a fair use.

These cases do not involve literary parody or burlesque at all. In each of them the plaintiff was the owner of a copyrighted song and all or a part of his work was produced verbatim in the same form and manner as it might be presented by any commercial licensee of the right to perform a song. There was no attempt to transmute or change it in any way. Literary creation—authorship—by the accused was not involved.*

Not long after Trial Judge Carter's decision in the instant case, *Columbia Pictures Corp. v. National Broadcasting Company*, 137 Fed. Supp. 348 (1955), involving Sid Caesar's burlesque of the motion picture "From Here To Eternity", was also tried before him. In holding for the defendant, Judge Carter apparently receded from his opinion that a parody or burlesque must be tested by the same standard as any other appropriation, for conclusion of law No. 7 in that case states:

> "Since a burlesquer must make a sufficient use of the original to recall or conjure up the subject matter being burlesqued, the law permits more ex-

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*Similarly, Leon v. Pacific Tele. & Tele. Co., 91 F. 2d 484 (9th Cir. 1937), which the courts below cited [R. 254, 283], has very little, if anything, to do with the question of burlesque or parody of another's literary work. In the Leon case the plaintiff had compiled a telephone directory. Working from that directory alone, defendant physically rearranged it to place the information in a different order. He made no attempt to gather his own information or to do any original work whatever, although the field was open to him. See Hartford Printing Co. v. Hartford Directory & Pub. Co., 146 Fed. 332 (C. C. D. Conn. 1906). He neither added to nor changed the plaintiff's material in any way. There was nothing involved on the defendant's part except the labor of copying plaintiff's listings verbatim and reversing their arrangement.

> tensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original." (137 Fed. Supp. at 354; See Note: 56 Col. L. Rev. 585. 602-603 (1956)).

Judge Carter also appears belatedly to have recognized the applicability of the principle of fair use to burlesque to some extent, for he states, "Some limited taking should be permitted under the doctrine of fair use, in the case of burlesque, to bring about this recalling or conjuring up of the original." 137 Fed. Supp. at 350. The District Court's decision involving this burlesque was not appealed.

Textbooks and Treatics. Uniform support for the position that bona fide parodies and burlesques are "fair uses" is found in American textbooks and treatises, some of which are quoted below:

> "A bona fide burlesque is not an infringing copy. . . . A genuine burlesque of a serious work is not an infringement." 13 C. J. 1113, 1118.
>
> "A recognized form of review, although its nature is not always fully appreciated by its victims, is parody. It is entirely within the limits of fair use to make parodies or literary perversions of copyrighted works, even, it seems, in the form of drawings or cartoons." Weil, American Copyright Law, 432 (1917).*

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*The trial judge's statement that *"Weil, Ball and Amdur* are specifically contrary to defendant's position" [R. 248], overlooks the fact that the comments of these writers to which he refers as being "contrary" all deal with the mimicry cases. As we have pointed out, these cases do not at all involve the same elements of use as exist in the case of burlesques or parodies of literary works.

> "It is well settled that a parody is not an infringement of the right to copy . . . A peculiar application of the doctrine [of fair use] is also found in the law relating to parodies, which often approach actual copying, but have always been held legitimate." De Wolf, Outline of Copyright Law, 97, 142 (1925).

See also Spring, Risks and Rights, 177, 183, 186 (1952); Lindey, Plagiarism and Originality, 43 (1952).

D. Use of a Copyrighted Work in a Parody or Burlesque Should Be Deemed to Be a "Fair Use" Unless the Parody or Burlesque Supersedes or Is a Substitute for the Original.

Application of the principle of fair use to parody and burlesque requires the formulation of a standard for determining whether a particular parody or burlesque falls within the principle. In fashioning the test, the closely analogous cases referring to the use made by a literary critic or reviewer are the most instructive. Mr. Justice Story emphasized that to be fair, the critic's use must not "supercede" the original work or be a "substitute" for it. *Folsom v. Marsh*, 9 Fed. Cas. No. 4901, at 345 (C. C. D. Mass. 1841). Significantly, Mr. Justice Clifford used similar language in stating that reviewers may make use of copyrighted material so long as their review does not "supersede the original book" or become a "substitute" for it. *Lawrence v. Dana*, 15 Fed. Cas No. 8136, at 61 (C. C. D. Mass. 1869). Similarly, the court in *Farmer v. Elstner*, 33 Fed. 494, 496 (C. C. E. D. Mich. 1888), affirms the reviewer's right to make extracts so long as they "are not made as a cover for a republication."

A similar standard has been laid down in other leading fair use cases. Lord Ellenborough in *Cary v. Kearsley*,

170 Eng. Rep. 679, 680 (1803), indicated that an author could not use a copyrighted essay if the material he added was "only to colour the publication of the original essay, and make that a pretext for pirating it." In *Roworth v. Wilkes*, 170 Eng. Rep. 889, 890 (1807), which involved the use of plaintiff's book on fencing in defendant's encyclopedia, Lord Ellenborough said that the question was "whether the defendant's publication would serve as a substitute for it." In *Karll v. Curtis Pub. Co.*, 39 Fed. Supp. 836, 837 (E. D. Wisc. 1941) (see p. 25, *supra*), the court emphasized that the magazine article could not have diminished the value of the song involved, since no music was set out in the article.

Building on these precedents, the proper standard of fair use for application to parody and burlesque is whether the copyrighted work is used in such a way that the parody or burlesque supersedes or is a substitute for it. Such a standard is consistent with the primary purpose of the copyright clause; it promotes the useful arts by assuring reward to *both* the author of the original and the parodist. Under this standard, an author of a parody or burlesque could make use of a copyrighted work in his new creation, but under the principles of fair use he would have to stop short of using the copyrighted work in such a way that the parody or burlesque would supersede or become a substitute for it.

There is no pretense that this is a litmus test which can be easily and quickly applied. Mechanical standards are peculiarly out of place in the copyright field. Mr. Justice Story stated in *Folsom v. Marsh*, 9 Fed. Cas. No. 4,901, at 344 (C. C. Mass. 1841):

> "Patents and copyrights approach, nearer than any other class of cases belonging to forensic dis-

> cussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtile and refined, and, sometimes, almost evanescent."

Judge Learned Hand's classic statement of the test for infringement in an ordinary case not involving fair use is followed by his comment that "Nobody has ever been able to fix that boundary [of infringement], and nobody ever can." *Nichols v. Universal Pictures Corp.*, 45 F. 2d 119, 121 (2d Cir. 1930).* Speaking of the ordinary infringement standard, Judge Hand has also said, "The test is necessarily vague and nothing more definite can be said about it." *Shipman v. RKO Radio Pictures*, 100 F. 2d 533, 538 (2d Cir. 1938) (concurring opinion). Similarly with respect to parody and burlesque, we believe that the most that can be helpfully said is that the author of such a work must not use the copyrighted work in such a way that the parody or burlesque supersedes or is a substitute for the original.

The proper application of such a standard would obviate the Court of Appeals' fears that a dramatic work might be appropriated in its entirety "merely by introducing comic devices of clownish garb, or movement, or facial distortion of the actors, and presenting it as a burlesque" [R. 283]. A work which attempted to supersede the original in such a way can be recognized as an unfair use without any necessity for stifling the creation of bona fide parodies and burlesques.

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*"While we are as aware as anyone that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it: it is a question such as courts must answer in nearly all cases." (*Id.* at 122.)

Indeed, the failure of the Court of Appeals to accord parody and burlesque a right of fair use appears to stem from a misunderstanding of the nature of those arts. This is apparent in the court's reference to a serious dramatic work being "copied practically verbatim, and then presented with actors walking on their hands or with other grotesqueries" and other comments to the same effect [R. 284]. What the court is describing is not a bona fide parody or burlesque, but a subterfuge in which the basic literary values of the original are pirated. The genuine burlesque uses copyrighted material to remind the audience of the mood and content of the "original," but then "it takes off into the blue. . . . It leaves out much, but it constantly comes back, so to speak, to refresh itself to [from] the original, and then takes off again" [R. 156].* The true burlesque or parody never supersedes the original, but rather, through transformation of the tone and key of the original, is an independent work of art [R. 149]. It is this art form, not a "wholesale copying" or substitute for the original, which is entitled to the right of fair use.

E. The Long-Established Custom of Parody and Burlesque Supports the Right of the Authors of Such Works to Make a Fair Use of the Copyrighted "Original."

As we have shown, literary history abounds with examples of burlesques and parodies of particular literary works, using story lines, characters and situations as a springboard for new, imaginative and creative efforts. Such parodies and burlesques have been the publicly accepted custom since long before the first Copyright Act

*The burlesque or parody "amuses by its mixture of likeness and unlikeness to the original." Fowler, Modern English Usage, "burlesque."

in 1790. Under these circumstances, if Congress had intended that authors should be protected from having their works burlesqued or parodied, "it would seem," as has been said in a closely analogous circumstance, that "Congress would have made specific provision therefor." *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F. 2d 945, 950 (9th Cir. 1954); and see *White-Smith Music Co. v. Apollo Co.*, 209 U. S. 1. Yet Congress has taken no action indicating any intent to limit the rights of the parodist or burlesquer. The acquiescence of Congress in the publicly accepted custom of burlesque is a legislative recognition that the Act never was intended to and did not prohibit such custom.

Not only Congress, but all of those concerned have acquiesced in the understanding that the burlesquer and parodist have a right of fair use. Almost from their inception, radio and television have burlesqued books, plays, and especially motion pictures. Since 1932 Jack Benny alone has presented burlesques of sixty-two current motion pictures, including those produced by all of the leading production companies [R. 57-61]. If the motion picture companies had been of the opinion that a burlesque of their expensive pictures constituted an infringement of their valuable statutory rights therein, they would have long since made that position clearly known. Yet, in all recorded history, no author or copyright proprietor (with the sole exception of Eleanor Glyn and perhaps the licensee of "Tarzan and the Apes" as indicated pp. 40-42, *supra*) has ever before made legal claim that a bona fide burlesque or parody of any book or play was an infringement of his copyright.

Where all of the people so immediately concerned—authors and publishers of literary and dramatic works

and producers of motion pictures, including respondent Loew's, have acquiesced for a long period of years in the understanding that the use was not an infringement, such acquiescence constitutes an interpretation of the Act which is entitled to substantial weight under established rules of statutory construction. *United States v. State Bank of North Carolina*, 6 Pet. 29, 38-39; *United States v. Farrar*, 38 F. 2d 515, 517 (D. C. Mass. 1930); *Wells Fargo & Co. v. Mayor and Aldermen of Jersey City*, 207 Fed. 871 (D. C. N. J. 1913); 50 Am. Jur., Statutes, pp. 319-320. The trial court misinterpreted our contention in refusing to accept this argument on the ground that there was no proof that all the literary burlesques and parodies in the long history of the art were done over the objection of the authors burlesqued. We are not relying upon any established custom to infringe as supporting a continuation of a right to infringe; we are asserting that the failure of anyone to claim that a burlesque or parody *was* an infringement is evidence of the generally accepted belief that the copyright law did not extend to protection against this type of use.

American courts have been uniformly hesitant to extend copyright protection by interpretation, preferring instead to leave such matters to Congress. *White-Smith Music Co. v. Apollo Co.*, 209 U. S. 1; see *Fitch v. Young*, 230 Fed. 743, 745 (S. D. N. Y. 1911). In accordance with that wise policy, if the parodist's or burlesquer's right of fair use is to be limited in some way after all these years, the matter is one for the careful consideration of Congress in whose hands the Constitution placed power to grant copyright monopolies.

II.

The Burlesque "Autolight" Is a Fair Use of "Gaslight."

The issue as to whether the burlesque "Autolight" is a fair use of "Gaslight" has never been tried. The courts below failed to recognize the right of the author of a parody or burlesque to make a fair use of a copyrighted work. Thus, the findings and conclusions that Autolight infringed respondent's copyrights are not pertinent to the issue actually involved. Petitioners believe that it may be appropriate for the Court to remand the case to the trial court for a determination whether "Autolight" constitutes a "fair use" under the standards set forth above.

Should the Court, however, wish to examine the works involved and determine itself whether "Autolight" is a fair use, there is no doubt but that the Court should hold that it is a proper use of the copyrighted work "Gaslight". Consideration of the synopses of "Autolight" and "Gaslight" set forth in the Appendix, pages 1, 6, or of the films themselves will make it clear that "Autolight" does not supersede, nor is it a substitute for "Gaslight" and that it is, in short, a fair use of "Gaslight."

"Autolight" was an undisguised burlesque of "Gaslight." To burlesque, it necessarily had to use recognizable elements of "Gaslight" to remind the audience of that picture. Otherwise the burlesque had no point. But it took only what was reasonably necessary to produce the new artistic creation—the burlesque.

The great force and impetus of the picture "Gaslight" is created through the building up, brick by brick, of an entire structure. Each scene adds its small but effective

strength and weight to the development of the picture's tone. The imaginative treatment of incidents, scene by scene, creates the motivation and characterization and the heightened atmosphere of suspense which culminates finally in the sweeping climax. It was not the bare bones of the story that gave "Gaslight" its values; it was the expression, treatment and development of those bare bones—the deft way in which the author projected into reality an idea. The plot structure of "Gaslight" was of course necessary, but the skill or genius of the author did not lie in its concoction, nor did the value of the play to the beholder arise from that framework.

The writers of "Autolight" used absolutely none of the expression, treatment or development which made "Gaslight" a good, or even a great, motion picture. They used its bare bones—the greatly abbreviated story line and a very few of its incidents. They mocked in an exaggerated and ludicrous fashion the leading characters in the same fashion as has been done immemorially. What they did with these bare bones was to adorn them with their *own* treatment, expression and development, thereby creating something new. They could not have created a burlesque of "Gaslight" without using at least these bare bones or their equivalents.*

Everything that was serious, tense and dramatic in the original becomes hilarious in the burlesque. The whole tone of the original which the title, the setting, the cast, and the naked events have recalled to mind, is instantly transformed into the comic. Each happening that had its tremendously dramatic impact on the viewers

*Dr. Baxter contrasted the literary values of the two works [R. 153-155].

of "Gaslight" is subjected to a contrast with absurdity. Each full-statured character is contrasted with its caricature. The pictures on the wall, which in "Gaslight" are discovered missing, are turned upside down in the burlesque which causes them to "run," with comic results. The wife is terrified—of Jack Benny! Her forgetfulness consists of hiding a horse in a closet! The detective doubles as a carpenter—he knows about the house because he built it! And so on.

In the entire motion picture there is not even a single chuckle and almost never a smile; in the burlesque there is scarcely an instant's interruption of the audience's laughter. That result is produced, and could only be produced, by reason of the talents and ability for the construction of comedy possessed by the writers of "Autolight"—talents and abilities which in their very different way are perhaps equal to those of the writers of "Gaslight", and which are exercised just as much, if not more, in creating this burlesque as they would be in creating any other comic work.

The contemporaneous reviews of the motion picture "Gaslight" appearing in periodicals gave to the public much more information concerning the picture—much more of the story line—than could ever be obtained from watching the 15-minute performance of "Autolight."* Yet, as the cases cited above (pp. 22-23) make clear,

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*See "Life," May 22, 1944; "Time," May 22, 1944. "Life" contained four full pages of pictures and comments outlining the story in detail and comparing the motion picture with the stage play.

no infringement of copyright could be claimed by Loew's against any of the newspapers or magazines which reviewed the original motion picture. The use which "Autolight" made of the bare bones of "Gaslight" was as much a fair use of respondent's copyrighted material as was the more extended use of the same bare bones in the allied but no more firmly established field of critical review.

Not only did the writers of "Autolight" use less than the critics who reviewed the picture, but also less than did the authors of innumerable burlesques and parodies as exemplified by those summarized in the Appendix, and just as was the case in those works, every element which Benny's writers used was changed, inverted and metamorphosed into a diametrically opposite set of literary values from those created by the authors of "Gaslight." It was what the authors of "Autolight" *did* with the bare bones of "Gaslight" that produced this new and original and extremely funny television program.

"Autolight" is no plagiarism. Nobody could possibly think on seeing "Autolight" that he was seeing a performance of "Gaslight," or that he was seeing a copied version of "Gaslight." Upon seeing "Autolight," the viewer would no more be deterred from seeing "Gaslight" than he would have been by the fact that he read the story in the reviews in the current newspapers and periodicals. The two works are so diametrically opposite that neither could in any way supersede or be a substi-

tute for the other. They are directed towards two entirely different facets of human emotion and interest.

"Autolight" was a new and independent literary work. It was not a "servile imitation." It had its own values and its own place in the field of entertainment. It was a creative work in an established field of useful art. The use of copyrightable material necessary to its production as a work in that field was a fair use in accordance with the Constitution's command that the copyright law shall "promote . . . useful Arts."

Conclusion.

For more than two thousand years, free men have laughed at themselves and their works through the medium of parodies and burlesque. It is true that Dr. Joseph Goebbels thundered: "There are certain values in the life of a nation which *must* not be laughed at!" But it was John Wesley who observed: "I believe the glory of sporting with sacred things is peculiar to the English nation". It would be most ironic if the Copyright Act, whose constitutional right to exist depends upon its promotion and encouragement of the intellectual products of free minds in a free country, should be relied upon to deprive us and future generations of the full play of the talents of another Fielding, Thackeray or Harte. We do not believe the Act should be so interpreted. Rather, we think, the parodist and burlesquer should be guaranteed by the law the full scope of a fair use of their object's work, within such limits as will not

supersede that work and thus deprive its author of his fair reward, but to the end that coming generations may also enjoy a new "Shamela", "Rupert"—or "Autolight".

It is respectfully submitted that the judgment below should be reversed.

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APPENDIX.

I-A

Synopsis of "Gaslight"

The motion picture "Gaslight," almost two hours in length, is a suspenseful psychological drama. Its theme is that of the attempted destruction of one human being by another solely through pressure on the mind. It has three major protagonists—the husband (Gregory Anton), the wife (Paula), and the detective (Brian Cameron).

The opening scene of the picture acts as a prologue to set the sombre atmosphere of the drama. In it, Paula Alquist, as a child, is seen being taken by the kindly family solicitor through the fog-shrouded streets of London from the home in Thornton Square where her aunt has been brutally murdered by an unknown killer. In sharp contrast the scene immediately shifts to a bright and sunny Italian locale where Paula, grown into a lovely young woman, is studying singing. She has fallen in love with the charming and romantic musician, Gregory Anton, but the dimming memory of her early tragedy still so clouds her sensitive nature that she is fearful of accepting the happiness offered by his tenderness and understanding. She decides to take a trip alone in order to resolve her emotional conflict.

On the train to Lake Como her seat companion is Miss Thwaites, a garrulous English spinster, who in conversation unwittingly brings out the 10-year-old murder in Thornton Square. Paula's old fears overwhelm her, and when she is unexpectedly met at Lake Como by Gregory, she rushes into his arms to try to find in his tender devotion the happiness she desperately needs.

Their honeymoon in the Alps is idyllic, but at its end they face the question of a permanent home. Gregory

expresses a desire to live in London, and Paula, though with foreboding, agrees to return with him to the house in Thornton Square which she has inherited from her aunt. Together they inspect the gloomy old house and its contents, untouched since the murder. A single glove in a memento case and a portrait of Alice Alquist in the bejeweled costume of the Empress Theodora are given more than passing attention. Gregory maintains throughout his apparently completely sincere attitude of affection towards his wife until the discovery by Paula of a forgotten letter written to her aunt by a Sergius Bauer. At such discovery Gregory demonstrates a flash of sinister concern—the first sign that all is possibly not what is seems to be—but this is passed off by him as solicitude for his wife. However, from that moment the subtle attack on Paula's mind begins.

The next few scenes, in which the now-neighbor Miss Thwaites nosily interviews the deaf housekeeper and in which Gregory employs a sultry and impertinent housemaid (Nancy), develop the suspicion that something is amiss in the household—that perhaps Paula is ill. Nevertheless, she happily prepares for an outing with her husband to the Tower of London. Before leaving he makes her a present of a cameo brooch, stressing its sentimental value to him. On this holiday jaunt, so joyfully anticipated by Paula, incidents of importance to the story occur: Paula discovers the loss of the cameo; Gregory shows a passionate interest in the crown jewels; and the audience is introduced to the handsome Brian Cameron, who coincidentally is present at the Tower. On their return to Thornton Square, Gregory adroitly turns attention to the cameo and thus "discovers" that Paula has "lost" it. At this point for the first time and after Gregory has left the house, there occurs the dramatic and

chilling effect of the dimming of the gaslights, accompanied by faint noises overhead.

The play now switches to Brian, the handsome stranger, who has heretofore appeared only in the scene at the Tower of London. He and Miss Thwaites watch Paula make an attempt to leave the house, which is frustrated by an obvious inner compulsion of fear and mental turbulence. The audience still does not know of Brian's connection with the plot, but in the next scene at Scotland Yard we learn that Brian is a detective, that he is interested in Paula because of her resemblance to her murdered aunt, and that stolen and unrecovered jewels were involved in the murder.

The next scene takes place in the Anton home in which there is portrayed Gregory's quiet but merciless frustration of his wife's attempts to be helpful and his display of disdainful mock-pity towards her in the presence of the sullen, insolent Nancy. His cool composure is slightly but unmistakably upset by the attempts of Brian and Miss Thwaites to pay a call, and he makes it clear that visitors must keep away not only from his wife, but from himself. With a dramatic change in mood, Gregory, using all his old-time charm, invites Paula to the theatre. She is exuberantly happy at being able to escape for a while from the shadows that surround her. Gregory sharply interrupts this happiness by "discovering" that a picture is missing from the wall. When she denies having touched it, he calls in the servants to prove by their solemn denials that she must have been wrong, and he intimates she is losing her mind. Without at any time departing from the characterization of Gregory as a man of outward charm and solicitude, the author has now planted firmly in the minds of his audience the fact that he is inwardly an inhumanly sadistic torturer. Any linger-

ing doubts as to his character are dispelled by a scene in which Gregory shows a marked interest in the coarse little maid, Nancy, as he leaves the house alone. Again in Paula's room the gaslights go down and footsteps are heard above.

The next incident in the play involves a musical at the home of Lady Dalroy. Snatching at her last opportunity to get away from the house and herself, Paula insists on attending. Gregory apparently acquiesces but makes it clear to the audience that he is merely rearranging his plans to profit from this new development. At the musicale in the midst of a large group of dignified and socially prominent people and with Brian watching, Gregory "discovers" that his watch has been taken and unspokenly accuses his wife of its theft. She breaks down hysterically. Rushing the mentally distraught girl home from this function, Gregory seizes the opportunity to inform her (falsely) that her mother had been mad. He compels her to believe that the few realities to which she is trying to cling, such as the discovery of the Sergius Bauer letter, have never existed except in her own mind. Again in her room after Gregory's departure, the gaslights go down, the noises continue and her screams for help go unheeded.

Meanwhile, the detective, with the assistance of a subordinate acting as a police constable on the beat, has had Gregory under surveillance. They believe his nightly excursions have had as their destination the attic of his own house, which he has entered from another building. They have also obtained information which indicates that Gregory is planning some drastic immediate action against his wife. Cameron determines to warn her. He gains entry to the house by displaying the mate to the glove in the memento case, it having been given to him by

Paula's aunt when he was a small boy. Once in Paula's presence, he gently but firmly forces her to understand that she is the victim of a terrible plot formulated by her husband and aimed against her mind. In a search of the house he forces open Gregory's desk and discovers the Bauer letter, which is one seeking an appointment with Alice Alquist just prior to her murder. He proves not only that the letter was no figment of Paula's imagination, but was in fact written by Gregory himself. Anton is Sergius Bauer. As Paula and the detective talk the audience is shown Gregory in the attic feverishly searching for the jewels, and finally we see his discovery of them adorning the old costume of the Empress Theodora.

In the house below, Brian leaves to effect the capture of Gregory. Before he can do so, however, Gregory returns through a secret door and discovers the rifled desk. This compels him to quick action. In a scene with his wife he is able through sheer force of character imposed upon her sick mind to convince her that Brian himself was but a figment of her imagination. She is prepared to permit him to take her away when the detective returns, and the charming, diabolical murderer is captured and bound.

Grogory makes one last desperate attempt to escape. Left alone with his wife, he exercises all of his undeniable charm to induce her to free him by cutting his bonds. Instead, after an intense emotional struggle, she finally resolves her inward conflict by throwing the knife away, and, rejoicing in her final freedom from her husband's sinister control, calls for the detective to take Gregory away. The picture ends with the removal of Anton and a short scene between the detective and Paula giving some indication that happiness may possibly come to her at long last.

I-B

Synopsis of "Autolight."

The television parody or burlesque takes up 15 minutes of the half-hour Benny program. It utilizes for parody purposes only two incidents of "Gaslight"; (1) the episode with respect to the picture on the wall, and (2) the denouement of the disclosure by the detective, the capture of her husband and his final failure to induce his wife to free him. There is practically no suspense or dramatic development; the audience is simply told outright the bare bones of the story. Thus the skit opens by an announcer stating in pseudo-sepulchral tones, "The scene is the living room on the first floor of a four-story house in a gloomy and unfashionable quarter of London in the year 1871. Outwardly the atmosphere is one of peace, for even the servants are unaware that for the past weeks the master of the house has been systematically pursuing a sinister, diabolical scheme to drive his wife insane."

The single stage setting is a mock-Victorian living room. As the curtains open two maids are commenting upon the strange behavior of their mistress whose dinner is to consist of marinated salami with sour cream. Barbara Stanwyck, as "Bella," enters emoting ostentatiously. She is tormented by headaches. She is not particularly surprised at the type of food set before her, but cries desperately for her absent husband.

Enter Jack Benny, in an obvious takeoff of the suave, cold-hearted Gregory Anton. His every act, down to the exaggerated removal of his gloves finger by finger, is a burlesque of Boyer's polished performance. To Barbara's frenzied appeal for affection he is cold. Why has she left her room? Her reason is logical—what with

breakfast in bed and lunch in bed, the bed was full of dirty dishes.

Jack rings for the maid and the pull of the bell rope brings down a shower of bricks and plaster. This running "gag," used throughout the show, serves several purposes. It permits Benny to mock Boyer's nonchalance; it demonstrates the poorly built nature of the house; it lets Barbara illustrate her sanity (for later when she pulls the bell cord, she first carefully raises her umbrella), and it ultimately provides a smash conclusion.

When no one answers his summons, Jack lures Barbara into inattention, thus giving him an opportunity to rush about the room turning various pictures upside down with comic results. Having accomplished this purpose, he forthwith accuses Barbara of reversing the pictures, and declares bluntly that she is losing her mind. Her difficulty is that she either turns everything in the house upside down or does everything backward. "Yesterday when you came back from the fox hunt, you hung your riding habit in the stable and put the horse in that closet." She suggests that perhaps the butler has tampered with the pictures. This presents Jack with an opportunity to ring for the butler, with the usual plaster shower result which he accepts with injured but stoic innocence.

Jeeves, the butler, proves to be Rochester, who regularly appears on the television program as Benny's colored valet. He is dressed in a travesty of English servant-livery, knee-breeches and all, and combines exaggerated Briticisms with a Harlem accent. He is able quickly to clear himself by pointing out the absurdity of any idea that he has ever worked sufficiently to touch the furnishings. As a reward he secures a day off to go to a cricket match.

At this point Jack announces that he must leave for an appointment (unfortunately, as he admits, not a romantic one), and he does so after a kiss which Miss Stanwyck describes as "one-dimensional." This makes room for the entrance of the detective, played by Bob Crosby, Benny's orchestra leader. The detective is not only a Scotland Yard man; he doubles as a carpenter (he built the house) and is also somewhat of a magician. Barbara conveniently "mistakes" him for her husband, resulting in an amorous interlude hampered by the physical presence of Bob's carpenter-saw. This over, Bob goes directly to the point and in a few nonchalantly delivered sentences capsulizes the basic "Gaslight" plot. He tells Barbara that her husband is a jewel thief; that 10 years before he murdered a woman in this house; that he married Barbara so that he can search for the jewels; and that he is trying to drive her insane so that he can have her taken away and continue his search in the attic.*

Jack is now heard returning. Barbara cautions Crosby to hide in a closet. The first one selected proves to be occupied—by the horse! After Bob's concealment in another closet she decides to offer him the rest of the marinated salami, but he is not there. Magically he has transformed himself to the first closet. This, he declares, is for the purpose of proving to her that she is really quite sane, and of course parodies the gentle but serious approach which Joseph Cotten makes to Miss Bergman in the picture.

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*If this narrative monologue which takes less than 60 seconds had been omitted, any claim that the burlesque used the "story" of "Gaslight" would have small foundation. By the same token, such omission would have made it more difficult for the audience to recall to its mind the original and would thus have seriously blunted the comic effect of the burlesque.

Jack returns. He reiterates his accusation about his wife's proclivity for turning everything in the house upside down—the tables, the pictures, the chairs. This time he has gone too far, for the butler himself has been turned upside down and enters carrying a tray of drinks on his feet. Obviously this is only another part of Jack's cruel plot to confuse his wife. But she is now fully apprised of the facts and tells him so. Goaded to desperation the mousy Mr. Benny physically attacks the not-diminutive Miss Stanwyck, who loudly shrieks for the detective. He enters quite unperturbed by this scene of violence and is only interested in finding some rye bread to go with his salami. Urged on by Barbara, however, he finally remembers his role sufficiently to arrest Jack. He then retires to the kitchen, leaving Jack, trussed up, alone with Barbara.

The conclusion of the burlesque parodies that of the picture. Jack demands that Barbara get the knife and cut him loose. With a diabolical gleam in her eye she announces that she intends to do just that—cut him *very* loose! In a travesty of Paula's denunciation at the close of the motion picture, Barbara declaims:

> "It was you who turned the pictures upside down; it was you who turned the lamp upside down and almost convinced me that I did it; then you turned the table upside down, the desk upside down—One day I baked an upside-down cake and you turned it rightside up!"

With the knife at the very throat of the cowering Jack, she decides that killing is too good for such a scoundrel and instead rushes to summon the detective. As she pulls the bell rope and Bob enters, practically the entire ceiling falls down on the three actors, and the curtain descends on a scene of utter chaos.

II-A
For Whom the Bell Tolls.

By Ernest Hemingway

Charles Scribners Sons (1940)

This novel tells of the last three days in the life of Robert Jordan, a sensitive young American whose idealism has sent him to Spain to fight for the Loyalists in the Spanish Civil War of 1937. As an experienced saboteur, who has already blown up three trains, he is assigned the mission of destroying a strategic bridge in the mountains.

Robert is introduced dressed in a sun-faded flannel shirt, a pair of peasant's trousers and rope-soled shoes. He is carrying two packs, one heavy with dynamite wrapped in his sleeping robe, and the other filled with an exploder, a cigar box with the caps, the disconnected stock and barrel of a submachine gun, five clips, coils of copper wire, pliers, wooden awls and a big box of Russian cigarettes. Anselmo, an old gypsy, guides him to a cave in the mountains where the explosives may be hidden not far from the bridge.

The cave is the rendezvous of a band of Spanish guerillas. The nominal leader of the band is Pablo, a brutal but, braggart, but the real strength of the group lies in his wife, Pilar. Almost as wide as she is tall, she wears a black peasant skirt and waist, with heavy wool socks on heavy legs and black rope-soled shoes. She is vigorous, courageous and completely devoted to the Loyalist cause. Her earthiness is apparent in her conversation, typified by her greeting to Anselmo: "What are you doing now, you lazy drunken obscene unsayable son of a gypsy obscenity? What are you doing?" Anselmo introduces Robert as a dynamiter of trains who has come to the mountains to blow up the bridge.

A saddle blanket hangs over the entrance to the cave. Inside the cave are men at a table. The air was "heavy

with smoke of both tobacco and charcoal, with the odor of cooked rice and meat, saffron, pimentos, and oil, the tarry, wine-spilled smell of the big skin hung beside the door; hung by the neck and the four legs extended, wine drawn from a plug fitted in one leg, wine that spilled a little onto the earth of the floor, settling the dust smell; out now from the odors of different herbs whose names he did not know that hung in bunches from the ceiling, with long ropes of garlic, away now from the copper-penny, red wine and garlic, horse sweat and man sweat dried in the clothing (acrid and gray the man sweat, sweet and sickly the dried brushed-off lather of horse sweat), of the men at the table."

Also inside the cave is a beautiful girl named Maria whose hair is closely cropped, a vestige of horrible cruelties to which she had been subjected when kidnapped by the Fascists. To Robert, she is "little rabbit." Amid these surroundings and with these companions Jordan spends the short time remaining for the accomplishment of his mission. A tender and passionate love affair develops between himself and Maria which is described in a number of episodes, particularly the trysts in his sleeping robe and another in the heather of the mountain meadow where the lovers rapturously feel as though the earth has moved and shifted in space.

Jordan, Pablo, Pilar and other guerillas carefully inspect the locality of the bridge, which spans a gorge in the mountains. Swiftly but meticulously the engineer plans its destruction. The operation is successful; the bridge is destroyed, but Anselmo is killed by a falling fragment. In the effort to escape, Jordan's horse falls, crushing his leg so that he cannot ride, and he knows he must stay behind. As the others, including Maria, ride away, Jordan, alone except for his thoughts, is waiting the imminent attack of the Fascists with his machine gun ready.

ammunition, screwing it down with a grenade pin, a belaying pin and a Skull and Bones pin. Then he got out a magnum of Courvoisier. This is more their stuff, he said to himself. Then to make sure, he pulled out a carton of Abdulkas and a box of Corona Coronas. That was all he had in his knapsack except of course, his sleeping bag, a case of Old Grandad, three pairs of rope-soled shoes and an asbestos suit for when he blew up the boardwalk.

An old man sat at the mouth of the cave guarding the entrance with a Mauser, a Howitzer, a Winchester and a Flyswatter.

"Salud, camarada," said the old man.

"Equally," said Robert Jordan, then added, "Hola!" for good measure.

"Thou. Thou wast of the street-car?"

"Wast."

He is old, Robert Jordan said to himself. And the gypsy is old, too, and some day I will be old. But I'm not old yet, not yet, I'm not old.

"He knows of which whereof he speaks of, old one," the gypsy was saying.

"Que va, young one."

"It makes well to joke, old one."

"Pass, middle-aged one."

The mouth of the cave was camouflaged by a curtain of saddle-blankets, matadores' capes and the soles of old espadrilles. Inside it smelt of man sweat, acrid and brown . . . horse-sweat sweet and magenta. There was the leathery smell of leather and the coppery smell of

copper and borne in on the clear night air came the distant smell of skunk.

The wife of Pablo was stirring frijoles in a Catalonian wineskin. She wore rope-soled shoes and a belt of hand grenades. Over her magnificent buttocks swung a 16th Century cannon taken from the Escorial.

"I obscenity in the obscenity of thy unprintable obscenity," said Pilar.

"This is the Ingles of the street car. He of the boardwalk to come soon."

"I obscenity in the unprintable of the milk of all street cars." The woman was stirring the steaming mess with the horns of a Mura bull. She stared at Robert Jordan, then smiled. "Obscenity, obscenity, obscenity," she said, not unkindly.

"Que va," said Robert Jordan. "Bueno. Good."

"Menos mal," said El Sordo. "Not so good."

"Go unprint thyself," said Pilar. The gypsy went outside and unprinted himself.

The girl with the shaved head filled a tin pail full of petitie marmite and handed it to him and she gave him a great swig from the wine-skin and he chewed the succulent bits of horsemeat and they said nothing.

And now Esteban stood beside him on the rim of the gorge. This is it, Robert Jordan said to himself. I believe this is it. I did not think it was this to be it but it seems to be it, all right. Robert Jordan spat down the gorge. Pablo watched the fast disappearing globule of man-saliva, then slowly, softly spat down the gorge. Pilar said obscenity thy saliva then she too spat down the gorge. This time it was Pablo's gorge.

The girl was walking beside him.

"Hola, Ingles," she said. "Hello, English."

"Equally, guapa," said Robert Jordan.

"Que va," said the girl.

"Rabbit."

Robert Jordan pulled the pistol lanyard up, cocked his máquina and tightened the ropes of his rope-soled shoes. "Vamos," he said. "Let's go."

"Si," said Maria. "Yes,"

They walked on in silence until they came to a rocky ledge. There were rough rocks and thistles and a wild growth of Spanish dagger. Robert Jordan spread his buffalo robe out for himself and allowed Maria to lie near him on a bed of nettles. The earth moved.

"Rabbit," said Robert Jordan. "Hast aught?"

"Nay, naught."

"Maria," he said. "Mary. Little shaved head."

"Let me go with thee and be thy rabbit."

The earth moved again. This time it was a regular earthquake. Californians would have called it a temblor.

Robert Jordan had reached the boardwalk. He lay in the gorse and rubble. He had his infernal machine beside him, some hand grenades, a blunderbuss, an arquebus and a greyhound bus. His máquina was held securely in his teeth. Across the ravine Anselmo was sniping off sentries as they passed.

Listen, Robert Jordan said to himself, only the fascist bombs made so much noise he couldn't hear. You had to do what you did. If you don't do what you do now you'll never do what you do now. Not now you won't. Goltz was right. A real surprise surprised people. Sure it does. He lashed the wire through the rings of the cotter pins of the release levers of the wires of the main spring of the coil, insulating it with a piece cut off the bottom of his rope-soled shoes.

What about the others . . . . Eladio and Ignacio . . . Anselmo and St. Elmo? And Rabbit? I wonder how Rabbit is. Stop that now. This is no time to think about Rabbit . . . Or rabbits. Better think about something else. Think about llamas. It's better to breathe, he thought. It's always much better to breathe. Sure it is. The time was gradually, inevitably drawing near. Someone in the valley was singing an old Catalonian song. A plane crashed quietly overhead. Robert Jordan lay still and listened for the gong to sound.

III-A

Cradle of the Deep.

By Joan Lowell

Simon and Schuster, Inc. (1929)

During the late 1920's so-called "romantic travel books" enjoyed a great American popularity. These included "Trader Horn," "White Shadows in the South Seas," Richard Halliburton's many works, and similar adventurous, but doubtfully "true-life" stories. Near the top of the best-seller list was Joan Lowell's "Cradle of the Deep." It purports to be an autobiography of a young girl who spent most of her life from infancy to young womanhood as companion to her father on board a trading schooner sailing between the West Coast of America, and Australia and the South Seas.

Joan is the youngest of a large family. Her father is an experienced sailing captain; her mother is a member of the Lowell family of Boston. She was first taken to sea by her father at the age of 11 months, and the book is an account of her many and varied experiences with the rough but generally kindly crew of the schooner "Minnie A. Caine." Her special friend in the crew is the old sail-maker, Stitches. Other members include Bulgar, a Hungarian; Fred Nelson, a handsome young Dane; and Svenson, a lecher.

Joan's adventures are many and varied. As an infant she is kept alive by milk from a goat obtained by barter from South Sea natives. She is taught to swim by her

father and learns to swear from the crew. Since her father is a strict disciplinarian, she is frequently the recipient of a rope's-end properly applied, but the physical punishment is interspersed by lessons from the Bible. She has an unhappy experience with the perverted Svenson, but fortunately escapes harm.

Her biologic education is completely practical. She is introduced to life's mysteries by the capture and dissection of a pregnant female shark. She also witnesses the birth of native children and the sailors' attention to the native women. She is almost lured into a house of ill fame in one of the ports, but is rescued by friends of her father.

Joan plays strip poker with the crew, but these coarse but respectful sailors permit her to pay her losses with clothes taken from the spare sea chests. She engages in a cursing contest with disastrous results to her person when her father catches her. She also has a puppy-love affair with a young sailor, Fred Nelson. This ends when the seaman, recognizing that his affection for Joan is too strong, refuses the Captain's offer of a berth as first mate and leaves the ship.

On one of the cruises the ship sails through a dangerous field of icebergs and stops at Pitcairn Island. On another it is almost destroyed by a tremendous water spout and all hands are saved only by the timely and time-honored method of "exploding" the spout by a shot from a high-powered rifle.

At the South Sea Island of Atafu the native chieftain invites Joan and the crew to watch the ritual dance of the virgins at which the young native girls choose their husbands from the assembled bachelors. Joan is much impressed and back on the ship she attempts to perform the dance herself but is again punished by her father when he finds the crew watching her imitate the native girls.

The climax of the book is a fire at sea which completely destroys the "Minnie A. Caine." The life boats are capsized and Joan is compelled to swim for her life. She and her father are finally rescued by the crew of a lightship, but her father decides that this harrowing experience will be his last at sea and retires to live with her mother in the family home in Berkeley, California.

III-B

Salt Water Taffy.*

Or, Twenty Thousands Leagues Away From the Sea.

The Almost Incredible Autobiography of Capt. Ezra Triplett's Seafaring Daughter

By Corey Ford

G. P. Putnam's Sons (1929)

This hilarious burlesque was, like the original it mocks, one of the best sellers of the day, and it remains a very, very funny book. Character by character and incident by incident it spoofs "Cradle of the Deep" in a manner which can only faintly be reflected in any synopsis.** The somewhat gushing style of the Lowell work is carefully parodied and the burlesque includes some photographs of the composite type which are wholly illustrative of its purpose and effect.

June, whose father was the son of Henry Greenleaf Lowell and a beautiful sloe-eyed Turkish princess named Mezzanine, went aboard her father's ship the *Minnie I. Cohen*† at the age of two or three weeks. At that age she was "perfectly content just to lie about her father's boat—a habit which persisted in later life."

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*Corey Ford is one of America's best-known contemporary humorists. He has written innumerable parodies of literary works, some under the pen name of "John Riddell," and others under his own name.

**Copies of "Cradle of the Deep" and "Salt Water Taffy" are in evidence as Exhibits 12 and 13.

†Also variously called throughout the work the *Carrie L. Maine, Ethel M. Dell, Edith M. Wharton, Mabel W. Willebrandt, Anna M. Wong, Aimee S. MacPherson, Mary R. Rinehart, Virginia C. Gildersleeve, Marie L. Stopes, Louisa M. Alcott, Clara H. Bow, Ella W. Wilcox, Anna Q. Nilsson*, and finally *City of Lowell.*

Her companions included a old sailor named Britches (he and his brother were sons of a person of the same name): Vulgar the Boatman; the young and affectionate Knut Hansom; the bully Ole Olsen; and Sedlitz, an old salt from Epsom.

As an infant June also had difficulty in finding proper food. A suggestion one sailor that since the ship is a "she" they might milk her rudder is disdained by her father in stony silence. He finally acquires a goat named "Sweetheart," but after a month has passed with no milk, her father is suspicious and investigates. That night June is served goat's meat for dinner, and is sadly told that "Sweetheart" was not the kind of a goat that would ever give milk. This experience, accompanied by a reading from the "Song of Solomon" by her father, is her first realization that there is something such as Sex.

She is also further initiated into the mysteries of life by the capture of a shark, which when opened is found to have within its body a copy of "What Every Young Girl Should Know." Father, however, snatches the book for his own edification, giving June the usual "whipping on my stern-sheets." She is likewise subjected to approaches from Ole Olsen, but his ineptness is so great that she decides to give him lessons, and *he* is saved from a fate worse than death by her father's timely arrival.

Capt. Triplett's ship also has waterspout trouble, but it is pursued by a whole herd of waterspouts. Disaster is averted by a shot from Father's trusty rifle:

> "For a moment the waterspout halted dead in its tracks, swaying backward; then slowly it tilted forward, and collapsed with a horrible roar. Hundreds

of tons of water, fish, seaweed, and a couple of tourists from a nearby steamer descended on our decks, as the stricken waterspout thrashed once or twice feebly, muttered something about taking a letter to 'Jo,' twitched convulsively, and disappeared into the sea."

The dispersed herd leaves behind a baby waterspout. June proceeds to capture it through her excellent swimming. She names her pet "Gladys," and after it becomes house-broken, it is a general favorite aboard ship.

June is likewise taught to swim by her father, but in the process the old gentleman almost drowns since he has never learned to swim himself. She also engages in strip poker with the crew, a game "similar to our old-fashioned game of 'Authors,' except that spades are always trumps, and in addition these spades have got to be colored red or else they don't count." She is careful to lose, but is saved from exposure, first, by the noble Knut Hansom, next by her father, and finally by the timely distovery that they are approaching the Virgin Islands.

These islands are located just opposite the Isle of Man, and the author explains in a footnote that "In general their longitude is unknown; but their latitude, on the other hand, is strongly suspected." The shores are lined with Virgins waving and fluttering handkerchiefs as they spell out the native word "Gimmi-gimmi-gimmi," which means "You're welcome!" in Virgin. The native chief, Luki-Bum, invites all to the festival of the Virgins. June is so entranced by this spectacle that she decides to become a Virgin herself, but is saved by old Britches

who proceeds to emulate her father and give her a spanking.

The love interest is also adverted to. June is disappointingly saved from a career in a sailors' honky-tonk by the noble Hansom. He tells her of his love, but in an excess of nobility (and in an extremely stilted speech) announces to the Captain that it is not for the likes of him, a common sailor, to cast his eyes so high, bids all a fond "Farewell!" and steps off the deck into the sea. He is followed by the crew, first individually and then en masse, who acknowledge their devotion to June, declare their equivalent breach of etiquette, and politely step off the side of the boat leaving no one but Father and Britches.

This necessitates the conclusion of the story. It is decided to burn the boat after first notifying the press and photographers to be present for June's swim for life. The swim continues from Australia across the Pacific, and when the Panama Canal is blocked by the presence therein of Richard Halliburton, June detours around Cape Horn, and thus up to New York Harbor. During this natatory performance June is busily engaged in writing her autobiography which is proof-read by her father, who is following her in a row-boat. Upon her arrival in New York, she is given the usual greeting by the Mayor, complete with ticker tape, and is presented with a finished copy of her own story, "Salt Water Taffy." As she reads it she feels as if she actually had experienced the adventures she has depicted. "What happy times we must have had, after all, on dear old what's-her-name!"

IV-A

If Winter Comes.*

By A. S. M. Hutchinson

Little, Brown & Co. (1921)

This book, which headed the "Best Seller" lists in both England and America, is essentially a character study in novel form. The qualities of Hutchinson's hero are developed through a series of minor every-day incidents which take up most of the book; they are tested by a succession of major catastrophes which are depicted in the last 60 or 70 pages. The style is introspective and subjective; most of the story is narrated in the third person, although the more dramatic incidents are recounted by Hopgood, a garrulous but understanding solicitor.

Mark Sabre is a quiet, thoughful, tolerant man in his middle thirties, with a keenly developed social and personal sensitivity and conscience. He works in the dignified, somewhat stuffy firm of Fortune, East & Sabre, dealing in church and school supplies in Tidborough, England. Mark's father was a partner in the firm, and he has inherited a one-fifth interest in it, but he has not been made a partner. The only surviving partner, Mr. Fortune, feels that Sabre is a little queer, and Mr. Twyning, an aggressive business man, is evidently on his way to displacing Sabre in the conduct of the firm. Sabre is interested mainly in the textbook department, which he has built up and for which he has written several history texts for schools.

Sabre is unhappy in his marriage. His wife, Mabel, is an efficient housekeeper, but a very mercenary and

*Mr. Hutchinson is a modern English novelist, still living.

snobbish woman who is completely unable to understand her husband's rather unworldly attitude. They live at "Crawshaw's," an old house in the tiny village of Penny Green, whose old-world charm is being threatened by a modern housing development. They employ as maids two sisters named Jinks, who have been dubbed by Mark "High Jinks" and "Low Jinks" because of their variation in size. This whimsy delights the maids, but is distasteful to Mabel, as showing too great familiarity with the "lower classes." She is also disgusted with Sabre's friendship for some of the more intelligent villagers.

The story moves leisurely through a succession of small incidents: Sabre's dislike of his "den"; his interest in bicycling with its opportunity for privacy and thought; his "game" of marking his coasting distance by pegs; his distaste for Mabel's snobbish, gossipy and positive friends, including the sporty vicar, Boom Bagshaw; his meeting with his former sweetheart, Nona, and her dashing but amoral husband, Lord Tybar; his troubles at his work where Mr. Fortune refuses to discuss the hoped-for partnership and Twyning schemes and bullies. From these many little happenings there emerges the picture of Sabre as an extremely sensitive, too-tolerant, reserved man—vaguely unhappy but yet unwilling to take any affirmative action because of the fear it might hurt others in some way.

His growing attraction to and for Nona leads to difficulties. Mabel evidences a snappish jealousy, resulting in more friction. This is capped by a "blazing row"

when Twyning supersedes him as to the partnership, and he comes home seeking sympathy. He is giving serious consideration to an affair with Nona when the petty matters are interrupted by the outbreak of World War I. However, Sabre is rejected for military service because of a heart condition and must continue his aimless and pedestrian life in Penny Green. The war brings tragedy; many of his friends in the village and elsewhere are killed, as is Lord Tybar. Finally Sabre is accepted in the draft; serves well, is awarded a commission and after being severely wounded is invalided home late in 1917.

At this late stage in the book, the melodrama begins. While he was in France, his wife had taken as her companion a pretty girl, Effie Briggs, the daughter of an employee of Sabre's firm. On his last leave home before his injury, Mabel had discharged the girl for some fancied lack of respect for her "betters", against Sabre's protests. Effie now writes that she is homeless and destitute, being the mother of an illegitimate child, and seeks sanctuary with the Sabres. Touched with compassion, Sabre insists that she be taken into the home; Mabel, outraged, leaves him. His employer, encouraged by Twyning, discharges him; the villagers turn against him, believing the worst. His wife, whose faith at least he expects, sues for divorce naming Effie. The final blow comes when Effie kills her baby and commits suicide, using poison Sabre had purchased for cleaning purposes, and when at the inquest the vindictive Twyning almost

persuades the coroner's jury that Sabre had committed a double murder.

Completely crushed, this senstitive man returns home to discover a note to him, hidden by Effie, in which she confesses that the father of her child was in fact Twyning's adored son. Sabre rushes to have it out with Twyning to discover that the latter has just had news of his son's death at the front. Mark burns the letter, but he suffers a stroke.

However, the evil days are over. Slowly he recovers with the devoted help of Nona. Mabel's suit for divorce goes uncontested, and Mark and Nona at last find happiness in marriage and the prospect of a future in which he can, with her sympathetic help, regain his composure and his stature.

IV-B

If Winter Don't, by A. B. C. D. E. F. Notsomuchinson.

By Barry Pain*

Frederick A. Stokes Company (1922)

This little book is introduced by a "Prefatory Note" in which the author gives a humorous and kindly but penetrating criticism of "If Winter Comes," especially certain of its characterizations, its plot and its style. He also comments on his distaste for some of the tricks which the "Great Novelists of today" use. The comment concludes: "In fact, one gets irritable. And then anything bad may happen. This parody for instance."

The style of the book is a clever mockery of Hutchinson's introspective approach, especially in its use of cryptic sentences and chapter and section separations. Mr. Pain's hero, Luke Sharper, lives at Jawbone, Halfpenny Hole, Dilborough. Jawbones is an old-world house, in an old-world village with an old-world bridge crossing an old-world stream and surrounded by old-world cows. The Sharpers have two maids whom Luke waggishly calls "Dot" and "Dash," since their last name is Morse, although his common-sense wife, Mabel, is definitely not amused at his humor. He is employed by the firm of Pentlove, Postlethwaite and Sharper, purveyors of jams and pickles, whose slogan is "Perfect Purity." The sen-

*Barry Pain was a distinguished English humorist, a prominent journalist, and the editor of the well-known English magazine "Today." He specialized in parodies and burlesques and published more than 40 separate books.

ior partner is Mr. Diggle; the factory manager is Arthur Dobson, whom Luke considers a full-blown knave and whose specialty is the continuous discovery of some cheaper place to lunch. Luke represents the literary side of the business, since he writes all the advertisements and takes special pride in his commercial brochures, "The Romance of the Raspberry" and "Thoughts on Purity."

Chapter by chapter Pain mocks Hutchinson's hero. Like Mark, Luke is unable to endure the word "den" (and in addition, such words as "salt-cellar," "tuberculosis," and "tennis-net"); as a consequence his wife coldly decides to call his room the "cage." He also enjoys the introspective delights of cycling. "He would go on in a snow-white ecstasy. Then he would get up, dust his clothes, and re-mount." He uses pegs to mark each point in the road at which he falls off. His distaste for Mabel's friends is directed primarily toward Doom Dagshaw, who is a circus owner who looks and acts like a vicar. He has an affinity for Jona Tyburn, who, if possible, is stupider than he is, and whose "dashing" husband, Lord Tyburn, fights tigers to prove his charm. Luke has the same difficulties at the office, as had Mark, but the reader is considerably more sympathetic with the long-suffering Diggle and Dobson than he is with Sharper. The latter's real concern about the partnership is to be able to see his name "above the line," and Mr. Diggle is quite able, as he says, to draw the line for himself.

As in the case of Mark Sabre, each incident is used to develop the "character" of Luke, but those traits which

were estimable, almost noble; in the Hutchinson hero become ridiculous in Luke Sharper. As Pain puts it, he "has the character of a child martyr—great at martyrdom; also at childishness." Everyone—Diggle, Dobson, Mabel—"were all so cruel and rude to him. Nobody loved him. Except Dot and Dash."

Pain uses an interesting device to deal with the melodramatic ending of "If Winter Comes." The abused Luke studies himself introspectively. He plans out in his mind his own biography, picturing himself wrongfully suspected, loathed by everybody (except Jona), suffering horribly, terribly ill. ("He thoroughly enjoyed it.") In this mood he postulates to his wife the awful things that must inevitably happen to him, describing as such events the melodramatic happenings in Hutchinson's story—the betrayal of Effie (their substitute maid), the hatred of the villagers, the suicide, the accusations, the discovery and the stroke. The sensible, disgusted Mabel points out how perfectly silly and far-fetched is the possibility that any such series of connected events could ever happen: Effie is not that kind of a girl; nobody knowing him would suspect such goings on; Effie would have applied for help from her seducer or his father; the last place she would have returned to would have been her own neighborhood; she would never had committed suicide, knowing that it simply would cause more trouble; she certainly would not use *his* cleaning fluid; etc. This common-sense approach simply makes Luke more despondent. As he says:

"'That's always the way. Whenever I make a beautiful thing, some cow always gets it. It's happened before. If I wrote my beautiful biography, some cow would parody it. The world's full of cows.'"

However, though he is not permitted (by common sense) to enjoy the trials of Mark Sabre, Luke must have his martyrdom too, related to the reader by Mr. Alfred Jingle, solicitor. Mabel, that excellent housewife, decides that he must undergo the rigors of a thorough spring house cleaning. The resultant confusion drives Luke to the point of madness, especially since Mr. Diggle decides contemporaneously to have a house cleaning in the firm also, thus relieving Luke of his job. He morosely decides to run away to Brighton, first leaving four packages of cleaning fluid where Mabel can easily find them and be sure to commit suicide. Seized, however, with the pangs of a remorseful conscience and feeling "like a lot of tripe out of some damn-silly book," he finally decides to go home, picturing Mabel in the throes of a painful death. Upon arrival he discovers that Mabel herself, completely disgusted with her jelly-fish husband, has run off with the backer of Doom Dagshaw's circus. Fortunately, however, for the necessary happy ending Jona is left; it is discovered that she is not really married to Lord Tyburn and she and Luke, as kindred souls, are wed to end the parody.

V-A

The Prisoner of Zenda.*

By Anthony Hope (Sir Anthony Hope Hawkins)

First Published 1894

Henry Holt & Co., Inc. (1898)

This novel is one of the first and probably the most consistently popular of the "mythical kingdom" romances. Its components include all the necessary elements—a gallant hero, lovely and mysterious ladies, thoroughgoing villains, the glamour of royalty, sword play, midnight rides, fast action and the intriguing theme of mistaken identity, portrayed against a background contemporary in time but medieval in setting.

Rudolf Rassendyll is a handsome, accomplished, wealthy and idle young Englishman who is the despair of his pretty sister-in-law, Lady Burlesdon, both because of his lack of purpose in life and because his appearance is a constant reminder of an ancient family scandal. He possesses red hair and a large nose which are characteristics of the Elphbergs, the ruling family of the middle European kingdom of Ruritania. These physical features are supposedly a Rassendyll bequest from a misalliance some hundred years back between one of his female progenitors and the then Prince Rudolf of Ruritania.

*The author was an English barrister, educated at Oxford. He was a prolific novelist, but "The Prisoner of Zenda" was his greatest popular success. The novel was dramatized and has been successfully filmed several times. He also wrote a very well-received sequel, "Rupert of Hentzau" (1898), likewise produced as a motion-picture.

Rudolf himself is more interested than shocked in this bit of family history and decides secretly to visit Ruritania to view the forthcoming coronation of its new King.

Arriving in Ruritania, Rudolf stops at the village of Zenda, fifty miles from the capitol city of Strelsau. Zenda is also the site of a hunting lodge, owned by Black Michael, the King's villainous half-brother who has designs on the throne. He also has designs on the beautiful Princess Flavia, the King's bethrothed, although Michael already has an "encumbrance" in the person of a sweetheart, Antoinette de Maubar. While strolling near the lodge, Rassendyll meets two Ruritanian army officers, Colonel Sapt and Major Fritz von Tarlenheim, close friends and followers of the young King, and shortly the King himself, who is visiting his half-brother, makes his appearance. All four men are astounded at the almost mirror-like resemblance between Rassendyll and the King.

The charming, somewhat weak and vacillating young King invites Rassendyll to a coronation-eve dinner at the lodge, at which there is much drinking, especially by the King. In the morning he cannot be awakened; apparently his wine has been drugged by Duke Michael to prevent the ceremony and thus furnish an opportunity for the Duke to seize the throne. To prevent this, Sapt and Fritz insist that Rassendyll masquerade as the King for the coronation and soon the young Englishman finds himself seated (temporarily) on the throne of Ruritania with the beautiful Princess Flavia at hand. He is immediately smitten with love for her; she finds in him a strange attraction she had never before found in her King.

After the ceremony Sapt and Rassendyll return to the lodge at Zenda to end the deception by the exchange

of places between the Englishman and the true King, but find only a blood spattered room. Black Michael has kidnaped the King and is holding him prisoner in his nearby castle. The lines of conflict are drawn: Michael and his charming but evil young protege, Rupert of Hentzau, plot to kill both the King and Rassendyll; the latter with Sapt and Fritz feverishly makes plans to rescue the King. Much fast action ensues. Michael's plan to kill Rassendyll is disclosed by the jilted Mlle. de Mauban and the Englishman fights his way out of the trap. Rupert, after first trying to assasinate Rassendyll, offers treacherously to join forces with him against Michael, but is curtly rebuffed.

Rassendyll finally hits on a plan to gain access to the King's prison by means of a large earthenware drainage pipe leading from the moat to the inner rooms of the castle, while Sapt and Fritz with their troops attack from outside. The plan is successful; Rudolf climbs the pipe, and in a series of duels kills Black Michael and the guards and rescues the King. However, the jaunty and debonair Rupert escapes.

The masquerade must now be ended at once for obvious reasons of state. Flavia is told of what she had half-sensed, that her beloved is not the true King. Each of the lovers must make the sacrifice—the Princess must marry the King, the Englishman must leave Ruritania. He goes, keeping his secret in his heart. But once each year thereafter he journeys to Dresden to visit Fritz and to receive a gift from Flavia—a single red rose.

V-B

Rupert the Resembler, by A-th-y H-pe.*

By Bret Harte

First Published 1900

(Reprinted in "Condensed Novels; New Burlesques" Houghton, Mifflin Company (1903))

Bret Harte's parody contains only 15 pages, but into them he has packed most of Hope's main events, and much of his flamboyant style, transformed from the romantic to the highly ludicrous in typical Harte fashion.

The burlseque opens as does the original with a breakfast discussion between the vain and vapid hero, Rupert Razorbill, and his sister-in-law, Lady Burleydon. She is berating him for his snobbish pride in his resemblance to the S'helpburgs, reigning house of Trulyruralania. Her sage advice to him is, "And for Heaven's sake, try to *be* something, and not merely resemble things! The fact is you resemble too much—you're *always* resembling. You resemble a man of fashion, and you're not; a wit, and you're not; a soldier, a sportsman, a hero—and you're none of 'em. Altogether, you're not in the least convinc-

*Francis Bret Harte was an American, who spent his early literary years in California, and thereafter removed to England where he continued writing until his death in 1902. Harte wrote two series of parodies, collected under the title of "Condensed Novels." The first series was written for the "Californian" in the 1860's: Mark Twain was a fellow contributor to this magazine. This series included such reminiscent titles as "The 99 Guardsmen," "Mr. Midshipman Breezy," "Guy Heavystone," "Lothaw," and take-offs on Cooper, Bulwer-Lytton, Charlotte Bronte, Victor Hugo, Wilkie Collins, and Dickens. The second series was written about 30 years later. It included "Rupert the Resembler" and parodies on Conan Doyle ("The Stolen Cigar Case"), Hall Caine's "The Christian," Westcott's "David Harum" ("Daniel Borem"), Kipling and Marie Corelli.

ing." Regardless, Rupert decides to go to Trulyruralania for the coronation.

He arrives at Bock, next station from the capitol of Kohlslau. Here he learns of the aspirations of Black Michael to the throne and the hand of the Princess Flirtia. Black Michael is so named because of his color. His forebear, the famous Prince Rupert (likewise our hero's putative ancestor) was rumored to have visited Africa, as well as England, in his amorous wanderings. In fact, as we shall see, he was apparently similarly occupied in Scotland. It seems that the "S'helpburgs are descended directly from Solomon—and have indeed some of his matrimonial peculiarities."

Strolling near the castle, Razorbill meets the two soldiers, Spitz and Fritz, and likewise the King, who though "not quite so good-looking (as Razorbill) or so tall. . . . was still a colorable imitation." The King, slightly drunk, thinks the resemblance is due to delirium tremens, but when assured it is not, decides that acquiring delirium tremens is a good idea anyway and invites all to dinner.

During the evening the King becomes so inebriated he cannot pass the test required for his coronation—that of being able to pronounce the name of his country intelligibly. Thus is Michael's plot—for he furnished the liquor—on its way to success, for in that country if the King is crowned while drunk the kingdom instantly reverts to a villian—any villain, no matter who. To save the day, Razorbill decides to masquerade as the King, and he and Spitz ride at full gallop for Kohlslau, only to realize en route that if they had taken the 7:15 excursion train they would have saved a precious hour.

Arriving at last however, they are dumbfounded to see the royal carriage pass with Flirtia sitting proudly beside —the King himself!

Rupert and Spitz catch the next train back to Bock and find the hut where the intoxicated monarch had been left, splashed with sinister red stains, which prove to be Burgundy. Fritz enters breathless to announce that Black Michael has just carried off the King. Who then was the man at the coronation? None other than a third "resembler"—Ruper of Glasgow, the ultimate product of the profligate old ancestor's trip to Scotland. Obviously, this new Rupert has been suborned by Michael to perform the role of the King. To thwart this plot is child's play:

> "I know not how it was compassed, but that night Rupert of Glasgow was left bound and gagged against the door of the castle, and the night-bell pulled. And that night I was seated on the throne of the S'helpburgs."

At his side is Flirtia whom he woos by quotations from the Song of Solomon—"Our great Ancestor"—and by decking her with the Order of the S'helpburgs—"three golden spheres pendant, quartered from the arms of Lombardy—with the ancient Syriac motto, *El Ess Dee.*" She finds him changed—he doesn't speak Scotch. Angered at being thus confounded with the descendant of a gamekeeper, he withdraws and in an hour is at Black Michael's castle and creeping up the drain pipe to discover the King playing poker with the villain. In a trice, Razorbill has Michael bound and lowered down the pipe. Drawing him up again to question him about Rupert of Glasgow, the hero is both astonished and pleased to find that Michael's

body in the pipe acts as a piston. "Mad with joy, I rapidly lowered and pulled him up again and again, until the castle was flooded—and the moat completely drained!" Thus his friends are able to enter the castle and the King is rescued.

Razorbill rushes in pursuit of the shifty Rupert of Glasgow, being fired on by all factions in the process, each mistaking him for one of the other resemblers. Certainly such resemblances are both confusing and unfortunate! He finaily discovers the Scot, who suggests that they join forces and alternately "spell off" the King when he is too drunk to act for himself. Nobly refusing, Razorbill draws his sword. His "strong" swordsmanship (learned out of a book) is not understood by his adversary who quickly disarms him and then escapes. Just as the Scotchman fades from sight, Fritz and Spitz enter, gleefully announcing that *they* captured Rupert of Glasgow some hours past and have already expelled him from the realm. "Fools!" gasps the hero, *"You have deported your king!"* and he faints from exhaustion.

When he comes to, he finds himself in a Pullman speeding home. Beside him is a letter addressed to "Rupert" (apparently all three) from Flirtia. Being confused, she has decided to marry Michael. However, to soothe the rejected suitors she informs them that in point of fact old Prince Rupert never left home in his life so that their respective ancestresses have been grossly maligned.

Razorbill's adventure is over. But once each year he receives a package from Trulyruralania. In silence in his own room he opens it and devours its contents—a goose liver sausage from Princess Flirtia.

VI-A

Jane Eyre.*

By Charlotte Bronte

First Published 1847

(Available in Everyman's Library,
J. M. Dent & Sons, Ltd.)

Jane Eyre is a young woman, "not handsome" but possessed of intelligence and a somewhat morbid and macabre imagination, although generally controlled by a good deal of self-possession and internal strength. Her character was affected by an extremely unhappy childhood. As an orphan she had been mistreated by unkind relatives and sent to a school with all the horrors of Dotheboys Hall, though of a different nature. After some years of teaching she becomes the governess for the ward (and illegitimate child) of Edward Rochester, master of Thornfield.

While Jane enjoys the quiet and isolation of the country, she is disturbed by mysterious noises and occasional demoniac laughter which she attributes to a tipsy seamstress. Her mild foreboding is not disspelled by the arrival of the master. Rochester is a strange combination of brusqueness, almost brutality, and distant but kindly consideration. His moods alternate with lightning rapid-

*Charlotte Bronte was the eldest of the three talented daughters of Reverend Patrick Bronte of Yorkshire. Both her sisters, Emily and Anne, were novelists of note, the former being the author of "Wuthering Heights." "Jane Eyre" is considered Charlotte's best work, and is an English classic.

ity; he treats her one moment with utter rudeness, the next with sombre courtesy. Mysterious events continue and even increase after Rochester's arrival. Jane hears one night a fearful cry from the third story, which is unexplained. On another occasion, awakened by a strange noise, she finds Rochester's door open and his bed on fire. She puts out the fire by pouring water on it. Rochester, who awakens only when she pours the water on the bed, commands her to say nothing about the incident.

Rochester, for all his moodiness, is socially active and appears especially interested in a young socialite, Blanche Ingram. He invites a group of his friends, including Miss Ingram, to be his house guests, and Jane is disdained and humiliated by everyone. She quietly accepts the affronts; she has already developed a deep inner attachment for Rochester. One evening while Rochester is away, the guests are visted by a gypsy fortuneteller whom Jane discovers to be Rochester in disguise. The house party is broken up by the mysterious wounding of an equally mysterious stranger.

Jane learns that a wealthy uncle desires to adopt her, but rejects his offer in order to stay at Thornfield. Her fine nature affects Rochester; he proposes and is accepted. Just before the marriage is to take place Jane awakens to find a strange; repulsive-looking woman in her room. The woman tears to shreds Jane's wedding veil. This ominous portent is fulfilled; at the wedding it is disclosed that Rochester is already married to the sister of

the wounded stranger. Admitting this fact, Rochester takes the guests to the attic and there shows them his wife, a raving maniac.

Jane leaves Thornfield at once. After some harrowing experiences, including near death from starvation, she is befriended by a minister and his family. Comfort is assured at last when she comes into an inheritance, and marriage is offered by the minister, but she refuses.

In one of her customary imaginative dreams, she hears Rochester calling her. Alarmed, she returns to Thornfield to find it burned to the ground—set ablaze by the madwoman who died as Rochester tried to rescue her. Jane finds her old master blinded and alone, and they are married. After two years Rochester recovers his sight sufficiently to see his first child.

VI-B

Miss Mix, by Ch-l-tte Br-nte

By Bret Harte

First Published 1865

(Reprinted in "Condensed Novels, First Series"
Houghton, Mifflin Company (1882))

Harte's burlesque of "Jane Eyre" takes up 10 small pages as compared with the three volumes of the original. Nevertheless, it mocks not only the basic story, but the style and mood of Miss Bronte's work in a real *tour de force.*

Like its target, "Miss Mix" is purportedly autobiographical. Its heroine is also "not handsome"—quite the reverse, though she prizes her temples—"like porcelain doorknobs." Sprung from a long line of governesses, she seeks employment as such at the age of 13 and finds it through an ad in the London "Times." Her new master is Mr. James R wjester of Blunderbore Hall; her charge a bright girl of 6 who has already been several times in love. As Miss Mix, dressed in a dowdy costume and carrying a blue cotton umbrella, arrives at the Hall she sees mysterious figures flitting through the funereal gloom and is greeted with a yell of demoniac laughter. As she awaits the master, fearful shrieks, the rattling of chains, loud curses, and the dragging of tables and chairs break upon the stillness, but she remains calm, drinking 7 cups of tea.

Her self-control is startled, however, when a man crashes through the window. It is the master entering

in his customary fashion—a fashion she considers "the unfettered impulse of a lofty soul breaking the tyrannising bonds of custom." She is impressed with his remarkable likeness to a gorilla, as he stands there absently tying the poker into hard knots and running it through his hair.

His conversation is as unconventional as his action. He curses her in one breath; in the next sternly announces that her little pupil is the "offspring of my mistress,—a common harlot"; in the third, lapses into polite and perfectly accented French. Suddenly he leaps out of the window, reappears down the chimney, and announces she is hired.

The night is filled with strange noises and horrors, bringing to the governess weird dreams. She awakens to the smell of smoke and enters Rawjester's bedroom to find his bed on fire and a semi-naked negress performing a ritual dance in the room. By the use of all available resources of water, including the garden hose, she douses the fire, at which the master yawns and awakens. First cursing her, he then draws her to him, murmuring endearments. Immediately relapsing into his old manner he throws his boots at her and bids her begone.

The scene shifts to the house party where Blanche Marabout, whom the little girl describes as "papa's sweetheart," is present. Miss Mix is fearful of losing her idol, since he shows his affection to Blanche by pinching and swearing at her. However, the heroine is reassured

of his love when he throws a candlestick at her head. The party is interrupted by the entry of a highwayman who takes all the valuables, but the governess cleverly discovers that this is really Mr. Rawjester. She decides to help him; the guests are locked in the cellar and the house set on fire. As the two watch it burn, Rawjester says to the calm and competent Miss Mix:

> "Mary Jane, I love you; the obstacles to our union are or will be soon removed. In yonder mansion were confined my three crazy wives. One of them, as you know, attempted to kill me! Ha! this is vengeance! But will you be mine?"

One sentence closes the burlesque:

> "I fell, without a word, upon his neck."

VIII-A

Pamela, or, Virtue Rewarded.*

By Samuel Richardson

First Published 1740

(Available in Everyman's Library,
J. M. Dent & Sons, Ltd.)

"Pamela" is generally conceded to be the first modern English novel—the first attempt in this field of literature to delineate characterization and psychological motivations. Richardson purported to expose his heroine's every thought, word and action so that his audience of middle and lower class readers could suffer vicariously with her. It was this new and effective appeal to the emotions which gave "Pamela" its unprecedented public success—certainly not the story as such. A less imaginative, more attenuated, and more commonplace plot can hardly be found anywhere.**

The novel consists in the main of a series of letters from the exemplary heroine, Pamela Andrews, to her father and mother whom she describes as "poor but honest." Pamela is the lowly, virtuous serving maid in the household of the wealthy Lady B— in Bedfordshire. As the book opens, Lady B— has just died and her only

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*Samuel Richardson was a printer, a Master of the Stationers Corporation, and Law Printer to the King. He was highly literate and at the same time almost wholly uncultured. At 50 he was commissioned to write a book of model letters for such "country readers as are unable to indite for themselves." This was the genesis of "Pamela"; he became so interested in the content of the model letters that he wove them into a story. It met with instant and extensive public acclaim.

**Samuel Johnson (who admired Richardson) once said, "Why, Sir, if you were to read Richardson for the *story*, your impatience would be so much fretted that you would hang yourself." (Boswell, "Life of Johnson," Vol. 1, p. 175.)

son, an accomplished libertine, has come to settle her affairs. He promptly commences his attempt to despoil Pamela of her "virtue," a process which runs the gamut forward and back through kindness, cajolery, enticement, bribes, threats, imprisonment and physical violence, continuing incessantly, interminably and unsuccessfully from page 2 to page 309.

After a few preliminary feints, such as flattery and more or less chaste kisses (which are the subject of much moralizing between Pamela and the kind housekeeper, Mrs. Jervis), Mr. B— gets down to business with some plain speech accompanied by rather rough fondling. Pamela nobly scorns his advances; he becomes angry and tells her to go back to her parents. Although apparently overjoyed at her escape, she somewhat oddly delays her departure, meanwhile occuping a bedchamber with Mrs. Jervis to protect her prized virtue. Mr. B— seizes this opportunity to hide in the closet, and when the ladies have undressed, rushes forth. Overpowered Pamela promptly throws fit after fit for three consecutive hours, which not unnaturally confounds her villainous master.

Pamela now resolves to go home, and in spite of some hesitation caused by Mr. B—'s blandishments, including an offer to find her a complaisant husband in his chaplain, Parson Williams, makes her plans. Mr. B— apparently acquiesces, furnishing a carriage, but instead has her carried off to his country place in Derbyshire, where she is imprisoned by his dissolute housekeeper, Mrs. Jewkes, who doubles as his procuress.

An extended business absence by Mr. B— gives Pamela time for pages of prosy moralizing and lamentations, interspersed with feeble attempts to escape. She

meets Parson Williams, as estimable young prig, who tries ineptly to help her, and as a last resort proposes honorable marriage. This possible avenue of comfortable evasion is effectually closed when Mr. B— intercepts some of Pamela's letters and has the Parson jailed for debt. Pamela steals a key and tries to break out from her confinement, first throwing the villainous Mrs. Jewkes off the scent by staging a pretended drowning, but this attempt is foiled because the locks have been changed.

Mr. B— now arrives at the estate, and after alternately upbraiding and cajoling Pamela, submits to her a written proposal, in seven formal Articles, for her to become his mistress at 250 pounds per year and keep, with the suggestion that if the "arrangement" is satisfactory to him after one year, he will even consider marrying her. His alternative is forceful accomplishment of his purpose. Pamela meekly but firmly rejects these proposals, in equally formal written style with copious protestations about her chastity and virtue.

Apparently this is too much for Mr. B— and by prearrangement with Mrs. Jewkes he plans to consummate his design. Disguised as a maid, he creeps into the bed occupied by Pamela and the housekeeper, and while Mrs. Jewkes holds the girl, he pounces upon her, declaiming, "Now, Pamela, is the dreadful time of reckoning come, that I have threatened . . . . Now you are in my power." Pamela's old weapon comes to her defense—she faints in a fit and the two conspirators believe her dying. Again she is saved from a fate worse than death.

Mr. B—'s purpose now seems shaken. He begs her to stay but two weeks more; then he will send her home. She consents, which does seem a bit odd in the light of previous events. However, she discovers that he is planning a sham marriage ceremony. Her plans for an immediate escape are again thwarted, but Mr. B— now discovers some of her letters to her parents and is moved by their nobility and high moral tone. He consents that she go.

Midway on her journey she receives an abject letter from him begging her to return and filled with fervent and admiring encomiums on her virtue. It convinces her —she returns and this time Mr. B— (obviously worn down) proposes honorable marriage. This produces an instantaneous metamorphosis—in Pamela's eyes Mr. B— is now the best, the kindest, the most generous and the most virtuous of men, and she is both humbly grateful and ecstatically happy. The marriage ceremony is promptly performed by Parson Williams; Mr. B— showers her with generosity (salted with some very sage advice on how to conduct herself as a gentleman's wife); her parents and the Parson are suitably rewarded; and Mrs. Jewkes reforms. Pamela herself, overcome with the great honor bestowed on her, worships her lord and master to the extent of adopting his illegitimate child, the product of a previous affair which both she and we are assured was the result of guile on the part of the girl and her mother. Thus the happy pair settle down to a long life and seven children, and thus is "Virtue Rewarded."

VII-B

An Apology for the Life of Mrs. Shamela Andrews.*

By Mr. Conny Keyber**

(Henry Fielding)

Printed for A. Dodd, at the *Peacock*, without *Temple-bar*.

First Published 1741

(Available U. of Cal. Press (Ed. 1953))

"Shamela" has been described as a work that "may well be the best parody in English literature.*** Small in size (20,0000 words as compared to "Pamela's" half million), ribald in character, it advertises itself as a book in which "the many, notorious Falsehoods and Misrepresentations of a Book called PAMELA Are exposed and refuted." Fielding's thesis was that Richardson had entirely misunderstood or misconstrued the events of Pamela's life, and that he, Fielding, being in possession of the true original letters between the girl and her mother, was bound to publish them in order to set the world right.

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*Sir Henry Fielding is considered one of the greatest of English novelists, his "Tom Jones" being an undoubted classic. He was lawyer and judge as well as author, and possessed through experience a hard-bitten but understanding wisdom concerning real human beings. "Shamela" is not the only book in which he showed his distaste for Richardson; "Joseph Andrews," published in 1743, was also begun as another burlesque of "Pamela." In this book the hero was Pamela's brother, whose would-be seducer is *Lady* Booby.

**The pseudonym is itself a parody. It is an obvious reference to the pedestrian playwright and literary hack, Colley Cibber, the then poet-laureate, whom Fielding cordially detested. There is a double barb to his book; "conny" (coney) was the current English term for "rabbit."

***Sheridan W. Baker, Jr., Introduction to "An Apology for the Life of Mrs. Shamela Andrews," p. xi, U. of Cal. Press (1953).

Since by hypothesis both Fielding and Richardson were dealing with the same life story, the events in their broad outlines are the same in the parody as in the original. The heroine is the same servant girl; the young heir (now given his "true" full name of "Mr. Booby") has the same designs; he alternately cuddles and curses her; there is the bedroom scene in Bedfordshire; the abduction to Lincolnshire; her meetings with Parson Williams and his arrest; the formal offer of a "mistress-ship"; the climactic bedroom assault; and the ultimate capitulation of the young squire to the bonds of matrimony. In outline and detail there is the identical sequence of events.

However, what Fielding does with this insipid plot is devastating to the author of "Pamela" and hilarious for the reader. The parents of the heroine, in fact, are far from being poor but honest. Her father is a cashiered soldier who had turned informer against several persons "on the late Gin-Act"; her mother sold oranges in the play house, an occupation traditionally followed by ladies of easy virtue from before the time of Nell Gwyn. As for Shamela (that, according to Fielding, being her real name), she is a worthy daughter to such parents. Already the mother of one illegitimate child, she is completely and calculatingly aware of the ways of men. She is highly resolved never to "lose" her chastity and "vartue"—unless and until she is well paid beforehand. She is all out for the main chance.

The other characters are fitted by Fielding to his purpose. The kindly housekeeper, Mrs. Jervis, has for her highest ambition the keeping of quite another sort of house in the London tenderloin district—one to which she trusts Shamela will come whenever she is sent for. Mrs. Jewkes is still the dissolute old haridan, but this

certainly does not shock Shamela, since she herself has already been a willing subject for the old lady's primary occupation. Parson Williams is in fact the father of Shamela's "little-bantling"; he divides his time between the ale-house and surreptitious visits to the heroine, which we may be sure are not wholly taken up with moral conversation. As for Mr. Booby, his name completely describes his character.

With such a cast, so motivated, the events which Richardson treats so seriously and moralistically become entirely the result of artful contrivance, and consequently purely comical. As soon as Mr. Booby shows the slightest interest in Shamela, she and Mrs. Jervis plan her own "seduction." The housekeeper acts for the pure sport of it, but for Shamela "nothing under a regular taking into Keeping, a settled Settlement, for me, and all my Heirs, all my whole Lifetime, shall do the Business." The bedroom scene, with its swoonings, is completely staged by the two ladies, and Sham is careful to permit Booby sufficient liberties to be thoroughly intriguing. The projected "abduction" to Lincolnshire is disclosed to Shamela well in advance by other servants, and she gleefully falls in with the plan both because it suits her purpose with the master and because it will bring her into contact with her beloved Parson Williams.

In Lincolnshire, Shamela quickly takes the measure of Mrs. Jewkes, since they are birds of one feather. Unlike her submissively lachrymose prototype, she engages in a hair-pulling match with the housekeeper and does not come off second best. Meanwhile her affair with the Parson progresses satisfactorily, and she stages the mock-drowning to allay Mrs. Jewkes' suspicions directed toward him.

This affair is interrupted by Booby's arrival, and Shamela hurriedly prepares for her campaign:

> "I immediately run up into my Room, and stript, and washed, and drest my self as well as I could, and put on my prettiest round-ear'd Cap, and pulled down my Stays, to shew as much as I could of my Bosom, (for Parson Williams says, that is the most beautiful part of a Woman) and then I practised over all my Airs before the Glass, and then I sat down and read a Chapter in the Whole Duty of Man."

Her scheme is conducted with consummate artistry—she is titillatingly coy and innocent and combines protestations of her "Vartue" with displays of her person. The expected results—the poor Booby is lured into the second bedroom scene. However, as Shamela says: "I remembered, Mamma, the Instructions you gave me to avoid being ravished, and followed them, which soon brought him to Terms.". The "Terms" include a formal proposal —250 pounds a year "besides several other advantagious offers" for her complaisance.

This would originally have delighted Shamela, but she now aims for higher things, and thinks she knows how to achieve them. As she puts it:

> "I thought once of making a little Fortune by my Person. I now intend to make a great one by my Vartue."

Unfortunately, before she can complete her plans, Booby becomes suspicious of the double-dealing Parson, flies in a rage, has Williams jailed and packs Sham off home. She quickly decides to brazen out this misadventure, on

the assumption that, let the worst come to the worst, she will be sure of her settlement in any event. The device works: Booby sends after her and we are treated to a detailed account of the wedding and wedding night.

Thus Shamela apparently has her reward. We are given a glimpse of her leading her stupid husband about by the nose, spending his money on the wildest extravagances, disowning her mother, and in the meanwhile carrying on as usual with the Parson. Fielding, however, has *his* sense of morality too, for he ends his little book with an Author's Postscript:

> "P. S. Since I write, I have a certain Account, that Mr. Booby hath caught his Wife in bed with Williams: hath turned her off, and is prosecuting him in the spiritual Court."

IN THE

Supreme Court of the United States

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONERS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 90

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, and JACK BENNY,

Petitioners,

vs.

LOEW'S, INC., and PATRICK HAMILTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONERS.

I.

The Ruling Below Will Stifle the Creation of Parody and Burlesque.

Respondents' opening contention—the claim that burlesque and parody do not need to use substantial copyrighted material (Br. 9-15)—focuses a vital issue in the case. The courts below have held that parody and burlesque are to be treated no differently from any other appropriation, with the result that infringement would exist if the taking were substantial [R. 252, 284]. The "substantiality" of a taking in the ordinary plagiarism case is measured by rigorous standards. As we have pointed out, the use of a single scene, sequence or incident may constitute infringement under that test (Opening Br. 32-34). The thrust of respondents' argument is

that this restrictive test would not handicap the creation of parodies and burlesque.

Respondents' argument in this regard overlooks the nature of the art of parody and burlesque and the way it is created. In a successful parody or burlesque, it is absolutely essential for the writer to call up in the minds of his audience the "original" toward which he is directing his burlesque. To do this he must use enough of the "original" to remind his audience of the plot, the setting, the characters, the sequence of incidents, the ideas, or the treatment of the original—or of some or all of these aspects of the original depending upon his focal point. These constitute the platform from which he takes off.

The author then creates a contrasting image. The effectiveness of his parody or burlesque will depend on the audience's perception of the contrast and the interplay between the new image and the original. Only to the extent there has been firmly fixed in the audience's mind a clear recollection of those details of the original from which the desired mental contrast is intended to arise can the parodist produce the peculiar effect which distinguishes parody and burlesque from other art forms.

To determine the legality of the author's use of copyrighted material to remind his audience of the "original," the courts below would apply only the "substantiality" test which is applicable to ordinary plagiarism and which measures infringement solely by the *amount* of the copyrighted material used by the author of the defending work. Under that test, authors, publishers, and producers would all face the paradox that only an unsuccessful parody or burlesque, one which fails effectively to remind its audience of the "original," would be

sure to escape a charge of infringement. Only such a parody or burlesque would not be "recognizable by an ordinary observer as having been taken from the copyrighted source." *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F. 2d 276, 278 (2d Cir., 1934), *cert. den.* 294 U. S. 717; *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. 2d 354, 361 (9th Cir., 1947); *Kustoff v. Chaplin*, 120 F. 2d 551, 560 (9th Cir., 1941).

The famous parodies and burlesque of literary history provide trustworthy evidence that the use of copyrighted material is necessary for the health and vigor of the art. Many of them—in fact, all that focus upon the "story line" of the original—would fail the rigorous test of "substantiality" and thus be found to infringe. By way of illustration, we believe that each of the parodies set forth in the Appendix to our opening brief* would be

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*The parodies contained in that Appendix are only examples and the list could, of course, be multiplied. Thus, Thackeray's "Legend of the Rhine" in "Novels by Eminent Hands" (1845) is a story-line parody of Dumas' "Otto the Archer" (1840). Thackeray also parodies Disraeli's "Coningsby" (1844) in "Codlingsby" (1845), and Disraeli's novel "Lothair" (1870) was also parodied as to its story by Bret Harte in "Lothaw" (1871). Jane Austen in portions of "Northanger Abbey" (1797) burlesqued the mood, part of the story line, and the important incidents in Mrs. Radcliff's "Romance of the Forest" (1791) and "Mysteries of Udolpho" (1794). The plot of M. G. ("Monk") Lewis' famous Gothic romance "The Monk" (1791) was ridiculed in a burlesque entitled "The New Monk" by "R.S. Esq." in 1798. Dumas (*fils*) "Camille" (1852) and DuMaurier's "Trilby" (1894) have each been parodied as to story a number of times.

Francis Burnand, famous editor of Punch, wrote perhaps a hundred dramatic and literary burlesques and parodies, a good example of which is his burlesque, "The Latest Edition", (1866) of Douglas Jerrold's "Black-eyed Susan" (1829). Henry J. Byron was another prolific English dramatic parodist. Typical are his "Miss Eily O'Connor" (1861), taking off Dion Boucicault's "Colleen Bawn" (1860) and "La! Somnambula" (1865), satirizing the plot of Bellini's opera "The Sleepwalker," (1831).

The New York Public Library drama section contains a number of typescripts of various turn-of-the-century Weber and Fields bur-

held to constitute an infringement under the "substantiality" test applicable to ordinary plagiarism.* At the same time, all of these parodies almost certainly would be held permissible under the "fair use" test which we urge should be applied.

The testimony of Dr. Frank Baxter, the only witness at the trial, certainly presents no support for respondents' claim (Br. 10-14) that parody and burlseque do not need to use substantial copyrighted material. Dr. Baxter's

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lesques, exemplified by "Arizona" (1900) [Exs. 16, 17]. Barry Pain attacked Michael Arlen's "Green Hat" (1925) in "This Charming Green Hat Fair" (1926). Robert Benchley's collected works contain parodies of Thomas Beer's "Mauve Decade" and Galsworthy's "Forsyte Saga". Christopher Ward, in three little books, "Triumph of the Nut" (1923), "Twisted Tales" (1924), and "Foolish Fiction" (1925) parodied the works of many authors. His parody titles, such as "Blacker Oxen", "Captain Bloodless" and "The Blunderer of the Wasteland" identify his targets. E. B. White's "Across the Street and Into the Grill" uses the plot line and style from Hemingway's "Across the River and Under the Trees".

The French have been particularly adept at this art. Voltaire's "Oedipe" (1718) was travestied by Biancolelli in "Oedepi Travesti" (1719) to the great French philospher's chagrin. Biancolelli also parodied Houdar de La Motte's "Inez de Castro" in 1723, and from them on French dramatic parodies have been numerous. See Yankwich, "Parody and Burlesque in the Law of Copyright," 33 Can. Bar Rev. 1130, 1134; Grannis "Dramatic Parody in 18th Century France" (N.Y. 1931); Travers, "Catalogue of the 19th Century French Theatrical Parodies" (N. Y. 1946).

*The extent of the use of the "original" in "Shamela" is indicated by the following comments: (i) "Its [Shamela's] cruel cunning lies in the way the author, who perfectly realizes the vulgarity of Richardson's creation, has dogged the footsteps of his victim, using time and again the very language of the original and gently tilting every equivocal situation or speech into downright vice or depravity." Kitchin, "Survey of Burlesque and Parody in English" 169 (Oliver and Boyd Ed. 1931); (ii) "Fielding reduces Richardson's two volumes to half a hundred pages, pinning scenes together with details from here and there (examine Shamela's relationship with Mrs. Jewkes), and yet following Richardson's contours exactly." Preface to "An Apology for the Life of Mrs. Shamela Andrews," p. xxxi (Baker Ed. 1953).

testimony that a burlesque does not precisely parallel the original (which respondents emphasize) is, of course, true. If it did, it could not be a burlesque. A burlesque is created by the deviations from the original; the art form therefore requires for its existence *both* the original *and* the deviations.

However, if respondents purport to infer from that testimony that a true burlesque never follows the broad "story line" of the original or never uses substantial sequential copyrighted material, they ignore not only the whole intendment of the witness's statements, but the entire history of the art.* To the contrary, considered in the light of the rigorous standards of substantiality, the testimony clearly indicates that parody and burlesque do need and do use copyrightable material to an extent which would not be permitted by such standards.** Referring to "Shamela," Dr. Baxter said:

> "While it is shorter than the original, the key incidents are used. . . . And of course it is a

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*"It follows that a rigid formula which would apply to parody and burlesque the sole test of substantiality of copying to be determined by similarity of sequence or 'order of events' in story development, and which would disregard all others, finds no support in the literary history of the English-speaking world. More, the use of such a formula would destroy the comic art, so important and rare, of which parody and burlesque are a part." Yankwich, "Parody and Burlesque in the Law of Copyright", 33 Can. Bar Rev. 1130, 1154 (1955).

**In referring to the need of parody and burlesque for copyrighted material, the word "need" is used in the sense of Webster's definition: "The lack of anything requisite, desired or useful; as, he felt the need of a better education". Webster's New International Dictionary, 2d Ed., Unabridged. Some parody and burlesque might survive under the tests laid down below, just as man might survive uneducated. But it is our position that the use of copyrighted material is useful and desirable for the health and vigor of the arts of parody and burlesque.

> magnificent burlesque, and you follow point by point the events, the significant events of Pamela, in this 'Shamela.'" [R. 123.]

Similarly, with respect to Corey Ford's "Salt Water Taffy," Dr. Baxter observed:

> "Chapter by chapter, book No. 1, the original, is followed in this mocking burlesque." [R. 130.]

Thus, while a parody or burlesque is usually much shorter than the original, and may not precisely parallel it, Dr. Baxter's testimony leaves little doubt but that the material it does use will very often rise to the level of "substantiality" as laid down in the cases.

Nor is there any help for respondents in Dr. Baxter's testimony that a burlesque "takes off into the blue." As Dr. Baxter makes clear [R. 149, 156], the platform for the take-off (and to which the writer must "constantly come back") is, in most instances, composed of copyrightable material which is cumulatively substantial. Thus, to apply the test of "substantiality" to burlesque would handcuff the author in the construction of that essential platform.*

Contrary to respondents' suggestion (Br. 12-13), it is also clear that *Columbia Pictures Corp. v. National Broadcasting Co., Inc.*, 137 F. Supp. 348 (S. D. Cal., 1955), upholding a burlesque of the motion picture "From Here to Eternity," does not show that parody and burlesque

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*Respondents do not advance their argument by announcing (Resp. Br. 14) that there may be parodies of philosophies or social and political attitudes which do not present any copyright problem. The question presented here concerns parodies and burlesques of specific, copyrighted literary and dramatic works, which constitute perhaps the most important part of the *genre*.

can prosper under the holding of the court below. Although that case was tried within a year after this case, the period of reflection between the cases apparently caused Judge Carter to alter his view that parody and burlesque are to be treated as any other use of literary property. The conclusions of law in the "Eternity" case state that "The law permits more extensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original." 137 F. Supp. at 354. Thus, the burlesque of "From Here to Eternity" was held not to infringe on the basis of a special rule applicable to burlesque and parody rather than under the standard applicable to ordinary plagiarism.

Although Judge Carter was more hospitable to burlesque in "Eternity" than in this case, he did not accept the principles of fair use as we view them (Opening Br. 46-49). He there based his decision, as respondents correctly state, on a finding that there was not a substantial taking of copyrighted material and, while his opinion is not entirely clear, he appears to invoke a concept of "fair use" which is controlled by some measurement of the "substantiality" of the taking.[6]

What is important here, however, is that in "Eternity" Judge Carter recognized that the nature of parody and burlesque requires that the author of such a work be permitted to use more copyrighted material than would be permissible where the alleged infringing work is of the same character as the copyrighted work. The court below in the case at bar, which is the law of the Ninth Circuit, not only failed to apply the principles of fair use as we view them, but it even declined to acknowledge

that the test to be applied to parody and burlesque is in any way different from that applicable where the alleged infringing work is of the same character as the copyrighted work.

II.

The Doctrine of Fair Use Is Not Limited to Insubstantial Uses. It Permits Uses Which Would Otherwise Constitute Infringement of Copyright.

Respondents' brief in this court represents a significant change of position on a vital point. In the courts below respondents recognized that the function of the doctrine of fair use is to permit a use of copyrighted material which would have constituted infringement but for the application of the doctrine. They recognized that the doctrine was not formulated to justify non-infringing uses, such as uses of ideas and themes which cannot be copyrighted and which everyone is free to use in any event, and such as insubstantial uses of copyrighted material which everyone is likewise free to make without regard to the doctrine of fair use. Respondents thus heretofore recognized that the doctrine of fair use was not synonymous with non-infringing use. They vigorously contended, however, that the doctrine was not applicable to parody and burlesque (see Resp. Br. 31, n. 25).

The courts below accepted both aspects of this argument: They acknowledged the existence of the doctrine of fair use as being applicable to uses which would otherwise be infringing, but they held that the doctrine was generally limited to "compilations, listings, digests, and the like" and that it did not extend to parody and burlesque [R. 282-283].

Respondents, however, now assert that fair use is simply another name for non-infringing use and that it never permits the use of substantial copyrighted material. This attempt to make "fair use" synonymous with "non-infringing use" and thus to read the doctrine of fair use out of the copyright law, should be rejected. Our opening brief (pp. 22-27) sets forth a sampling of the cases that apply the principle of fair use as an independent doctrine permitting uses which would otherwise infringe. Other decisions are referred to in such articles on the subject as Yankwich, "What Is Fair Use?" 22 U. of Chi. L. Rev. 203 (1954); Cohen, "Fair Use in the Law of Copyright," 6 ASCAP Copyright Law Symposium 43 (1955); and Note, 56 Col. L. Rev. 585, 593-597. These decisions and authorities demonstrate that it is too late to sweep aside a principle which courts of the United States have applied for more than a century and which so significantly reflects the constitutional purpose of copyright.

Contrary to respondents' claim, the test to be applied under the principle of "fair use" is not the same as the test of "substantial taking." The "substantial taking" test determines infringement solely by a measurement of the *amount*, quantity-wise, or quality-wise, of the author's work taken by an alleged plagiarist. As put by both lower courts, "the issue* becomes . . . what was taken, and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists" [Rep. 284, 252, 230-231]. But while such a test is appropriate in the case of the ordinary literary plagiarism, where

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* And, according to both courts, the *sole* issue, in the case of a parody or burlesque, where access to and use of the original are not only admitted, but asserted by the parodist.

anything more than a *de minimis* taking of that which is protected by copyright is and ought to be actionable, its application to every use of a copyrighted work, regardless of its purpose or nature, would violate the Constitutional mandate "to promote the Progress of Science and Useful Arts." Thus, in those cases other than plain piracy, the courts under their well established "fair use" principles look not alone to the *amount* used, but also to *why* it is used and *how* it is used, and above all, whether the use is needful to promote the public interest without at the same time unduly affecting the economic interest of the copyright owner to a point which defeats the Constitutional purpose. "Fair use" is the judicial appraisal of the sum total of all these factors, made in the light of the Constitutional purposes.

The right of a critic or reviewer to use copyrighted material under the principles of fair use, which respondents recognize (Br. 38), makes clear the striking difference between the "fair use" standard and the test of a "substantial taking." An extensive review or criticism of a play, a book, or a movie frequently contains very much more of the copyrighted material than would be proper if the purpose were not to review or criticize. "Lengthy extracts" from the subject work are permissible. *Hanfstaengl v. Empire Palace*, 3 Ch. 109, 128, 70 L. T. Rep. (N. S.) 854, 860 (1894), per Lindley, J.; *Bell v. Whitehead*, 8 L. J. 141, 142 (1839). Because the extracts are for the purpose of review or criticism, however, the test of infringement is not whether there has been a "substantial" taking but whether the criticism supersedes the original work or becomes a substitute for it. See *Lawrence v. Dana*, 15 Fed. Cas. No. 8136, at 61 (C. C. D. Mass., 1869); *Folsom*

v. Marsh, 9 Fed. Cas. No. 4901, at 344 and 345 (C. C. D. Mass., 1841); *Farmer v. Elstner*, 33 Fed. 494, 496 (C. C. E. D. Mich., 1888). Thus, where the principle of fair use is applicable, the standards are properly more liberal than the test of "substantiality" to be applied in a case of ordinary plagiarism.

The "illustration" cases provide other examples of circumstances in which a substantial taking is justified by the doctrine of fair use. It would be difficult to argue that the verbatim quotation of 13 lines of a popular song was an "insubstantial" use. A use of this amount by another writer of songs of a similar type would undoubtedly be actionable. *Cf. Robbins Music Corp. v. Weinstock*, 107 F. Supp. 102 (S. D. N. Y., 1952). Its use by the "New Yorker" magazine, however was held to be a "fair use" because of the purpose and manner in which it was used. *Broadway Music Corp. v. F-R Pub. Corp.*, 31 F. Supp. 817 (S. D. N. Y., 1940). The same is true of the quotation in "The Saturday Evening Post" of the lyrics of a song written for the Green Bay Packers football team. *Karll v. Curtis Pub. Co.*, 39 F. Supp. 836 (E. D. Wis., 1941).

Respondents' attempt to confine the doctrine of "fair use" to "insubstantial use" of copyright material runs counter to the views of commentators who have reviewed the cases in this field. One commentator points out that "Even if substantial appropriation is found, a cause of action for infringement is defeated if the borrowing comes within the doctrine of 'fair use.'" Note, 56 Col. L. Rev. 585 (1956). Another characterizes a view of the principle of "fair use" similar to that urged by respondents as "not in accord with that given to the term

in the great majority of cases." Cohen, "Fair Use in the Law of Copyright," 6 ASCAP Copyright Law Symposium 43, 46 (1955).

The position to which the author of a parody or burlesque is entitled is no more a preferred position than that enjoyed by a critic, a reviewer, a compiler, or a treatise writer (*Cf.* Resp. Br. 15-17). Wherever the doctrine of fair use may properly be invoked, the principles to be applied to govern the extent of its application are the same; it is only the weight given to each factor which necessarily varies with the facts.* Moreover, it is particularly appropriate that the principles underlying the doctrine of "fair use" should be applicable to parody and burlesque for the reason that they constitute new and independent creative works. In this latter sense they are sharply distinguishable from the abridgements, condensations, translations, dramatizations, and novelizations referred to by respondents (Br. 16).

Respondents state that they altered their position on "fair use" in part because of the difficulty of framing a generalization that would fit all of the cases. We have ourselves noted the difficulty of an all-inclusive definition (Opening Br. 27), but this is not an adequate reason for abandoning the concept of fair use. The Constitution requires that the copyright monopoly leave room for the dissemination of knowledge and the promotion of the

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*In that connection it must be remembered that the parodist or burlesquer alone among the practitioners of independent literary forms (save for the critic and reviewer) must use an "original" to some extent; he has no other alternative. Where some use is dictated by necessity, less weight ought to be given to the factor of the amount used than in cases where the author may produce substantially the same result without any use whatsoever of another's work.

useful arts. The unifying element in the cases applying the doctrine of fair use is the Constitutional mandate. See Yankwich, "What is Fair Use," 22 Univ. of Chi. L. Rev. 203, 213-214; Note, 56 Col. L. Rev. 585, 595. This Court should interpret the doctrine in accordance with the Constitutional objectives and decline to accept the debilitating construction now proposed by respondents.

Application of the principles of fair use relied upon by petitioners would not require a court to uphold every parody or burlesque that might be written, as respondents have suggested (Br. 45). Rather the test to be applied would result in the approval of only those bona fide parodies and burlesques which do not supersede or become a substitute for the original, as we have indicated in our opening brief, 46-49. Neither of the courts below determined whether the burlesque "Autolight" is a fair use under these principles. That issue should be decided by this Court or by the trial court upon remand.

III.

The Nature and Effect of the Use Here Made Does Not Make It "Unfair."

Respondents' contention that the nature of the use made here is "commercial" and hence should defeat any claims under the principles of fair use (Br. 35-40) is not well taken. It is true that television and radio productions are financed by means of sponsorship of commercial advertisers while publishers of books or producers of plays generally vend their wares directly to the public. However, the different economy of radio and television presents no reason for according different treatment to literary works presented over these media. Such works are not themselves advertisements; they represent

no less intellectual integrity than do the motion pictures of respondent Loew's. After all, few national magazines could exist without subsidization by advertisers who believe their literary content will attract readers who will thus be exposed to the advertisements.

The media of radio and television are entitled to the same respect and freedom as the media of books, magazines, stage or screen. They provide at least as great an impetus to creation and as great a market for the artist's work as do those other media. While the merits of individual programs on radio or television may be subject to debate, the fact is that many fine, perhaps great, literary accomplishments would never have reached the public were it not for the sponsorship of American commercial and industrial enterprises.* The nature of the economic support given to those works in no way changes their character or makes them products of a solely commercial or utilitarian nature.

The claim of respondents (Br. 42) that this particular parody must be an "unfair use" because it was presented over the generally competing medium of television is likewise without merit. All parodies must necessarily be aimed at the same general audience as their originals—those who can read and see and hear. Certainly "Salt Water Taffy" competed in the book trade with all other books in general, including "Cradle of the Deep" itself. So to some extent at least would a book

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*Respondents' repeated gibes at the fact that the parody in the instant case was sponsored by a national manufacturer of cigarettes (Br. 1, 2, 3, 8, 37, 39, 52) do not enforce their argument, especially in the light of the fact that Loew's pictures, including "Gaslight", may be regularly and repeatedly seen over television on programs sponsored by advertisers of various products, including soap, detergents and toothpaste.

criticizing an original. The fact that television may be a particularly effective competitor of the theatres should not require a special discrimination against it. If the parodist or burlesquer has created an original literary work, and not merely a subterfuge or substitute, he should be as entitled to exploit it on television as in the field of books or magazines, and as any other author. Furthermore, in this particular case, the competition was no more than general; "Gaslight" had been out of release for several years.

Respondents' claim (Br. 41.) of injury through preemption of the copyright owner's market for a burlesque of his own works (disregarding the inherent unlikelihood that any such burlesque can or will be successfully attempted by the author of the original) is necessarily based upon the proposition that he and he alone should determine whether, when and how his work should be the subject of pointed laughter. The claim may equally as well be made that an author shall exclusively determine whether, when and how his work shall be criticized. Such a claim only points up our contention that the copyright law should not be construed to stifle either parody or criticism.

Finally, respondents argue (Br. 42) that the parody was injurious in that it cast aspersions on the picture. There is no factual basis for any such claim, the District Court did not find that "Autolight" would inflict any pecuniary injury upon respondents; in fact, it specifically declared that no such injury was necessary to recovery [R. 253-256]. Actually, the inference is at least equally strong that the parody would help the picture by keeping the memory of this out-of-release production green and flourishing, thus inducing desire to see it again. In any

event, if in fact a parody or burlesque does have the effect of pointing up the weakness of the original, that does not make its use of such an original an unfair use. That is one of the legitimate functions of a parody or burlesque, whether primary or merely incidental, just as it is of direct criticism.

> "A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright." (*Hill v. Whalen & Martell, Inc.*, 220 Fed. 359, 360 (S. D. N. Y., 1914.)

Often the most effective weapon in criticism is to use the author's own words, development or treatment against himself. The same is true in parody and burlesque. The result is *damnum absque injuria*—the price the author pays and ought to pay if intellectual competition is to be free.

Parody and burlesque are art forms of real public value, and as such entitled to be fostered and encouraged in accordance with the Constitutional mandate. For such encouragement they need the broad application of the principles of fair use. In these circumstances, we submit that only an "injury" which had the effect of substantially discouraging the creation of other equally important literary types would be worthy of consideration in determining whether or not such principles of fair use shall be applied to parody and burlesque. No such injury has here been shown, nor do we think it could be. Parody and burlesque have existed and flourished for some thousands of years, and we do not believe a single author or publisher has ever been deterred in presenting a literary production to the world by the realization

(which up to now has been universal) that somebody else might use it for parody purposes. We venture the assertion that no person, including Loew's, would ever pay one penny less for a literary work if the lower courts' decision here were overturned, as we contend it should be. If that be so, there is no "injury" to the copyright owner—certainly none which can begin to compensate for the injury to the public arising from the stifling of this delightful and valuable art.

Conclusion.

It is respectfully submitted that the judgment below should be reversed.

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ANSWER AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, 1956.

No. 833.

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, and JACK BENNY,

Petitioners,

vs.

LOEW'S, INC. and PATRICK HAMILTON,

Respondents.

ANSWER AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Question Presented.

The District Court found that petitioners' commercial television play "Auto Light" was "copied in substantial part from the motion picture photoplay 'Gas Light' . . ." and that the "part so copied was and is a substantial part of said play and of the copyrightable and copyrighted material in said motion picture photoplay." [R. 84 (Find. XII).] The Court of Appeals concurred in those findings. [R. 283. Pet., Appendix B, 20.] They are not challenged here. The question, then, is whether copying or taking of substantial material—which, had it been taken and used in any other medium of expression, would clearly have been an infringement of the rights secured by re-

spondents' copyright—is privileged merely because the taking was for the purpose of parodying the copyrighted work. Both the District Court [R. 85 (Find. XV)] and the Court of Appeals [R. 283-285. Pet., Appendix B, 21-22] answered that it was not; and that the parodist was liable for his unauthorized appropriation to the same extent and for the same reasons as any other appropriator would have been.

Statement.

Since the findings of substantial copying are not challenged, no useful purpose would be served by reciting in detail the evidence upon which those findings are based. We, therefore, leave petitioners' statement [Pet. 3-6] with the few following additions.

Synopses of the infringed and infringing work, more accurate than those supplied by petitioners [Pet., Appendix A], will be found in the opinion of the Court of Appeals. [R. 280-282.] From these it will be seen that there was much more done by petitioners than merely "to poke fun" at the photoplay. Rather, there was baldly taken from it the locale, the main setting, the principal characters, the story points, the development, treatment, incidents and sequence of events of the story, and much of the dialogue. [R. 282. Pet., Appendix B, 19-20.]

In addition to the sum of $150,000 which respondent Loew's paid to acquire the motion picture rights to the drama on which its photoplay was based [R. 53], the sum of $126,691.98 was expended for screenwriters to adapt that drama to the screen. [R. 53.] On the other hand, the total writing cost of petitioners' play was only $5,716.66—obviously much less than the cost would have been if petitioners had been compelled to acquire the rights

to the material which they lifted from the photoplay or to create their own material. [R. 70.]

To petitioners' quotation from section 1 of the Copyright Act [61 Stat. 652, 17 U. S. Code, sec. 1] there should be added the provisions of subdivision (c) of section 1, which secure the copright proprietor in the right "to play or perform [the work] in public for profit, and to exhibit, represent, produce or reproduce it in any manner or by any method whatsoever. . . ." Petitioners' play was intended to be played or performed in public for profit; and it would have been so represented and performed but for the preliminary injunction below. [R. 69 (par. 26); 83-84 (Find. XI).] It was designed for use as an integral part of a television program advertising Lucky Strike cigarettes manufactured by petitioner American Tobacco Co. The air time for that advertising program was sold by petitioner Columbia Broadcasting System. Petitioner Jack Benny—whose part in the program was, of course, to attract the audience to be subjected to the advertising message—was compensated for those services. [R. 64 (par. 18); 67-68 (par. 22); 69 (par. 26).]

With respect to Benny's custom "to present short burlesques or parodies which poke fun at specific motion pictures . . ." [Pet. 4], the fact is that respondent Loew's was not a willing participant in his use of its copyrighted material without its consent. In a good many instances its permission to make such a use of its material was requested by Benny; and permission was granted on condition that Loew's have the right to approve his script. [R. 57-59.] In other instances, Benny's parodies were of motion pictures the basic literary material of which was in the public domain. [R. 59.] Benny, of course, was free, as was everyone else, to use this material. Use of the

copyrighted material from the photoplay "Gas Light", for Benny's parody was the subject of prompt objection by Loew's as soon as petitioners' activities in that regard were brought to Loew's attention. [R. 65-68; 84-85 (Find. XIV).]

It is customary and usual practice in the motion picture industry, to reissue photoplays five years or more after their initial release. "Gas Light" has not yet been reissued. [R. 56.] The copyright of that photoplay was secured in 1944 by publication with notice affixed; so, even without renewal, it will not expire before 1970. [R. 53-54 (par. 7).] It is, of course, common knowledge that motion pictures are frequently licensed by their owners for exhibition on television, in competition with "live" shows and with motion pictures being exhibited in theatres [see, *e.g., Republic Pictures Corp. v. Rogers*, 9 Cir., 213 F. 2d 662, *cert. den.*, 348 U. S. 858; *Autry v. Republic Productions*, 9 Cir., 213 F. 2d 667, *cert. den.*, 348 U. S. 858]; that television exhibition of motion pictures usually takes place many years after they were produced; and that the free entertainment supplied viewers of television has had a serious impact on motion picture theatre attendance.[1]

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[1]This latter fact discloses the economic basis for this litigation. Loew's is a large producer of motion pictures for which the theatre is the primary outlet. Television, too, is a source of revenue in that regard. Loew's, perforce, recognizes the right of television to compete for the patronage of the entertainment minded public; but it is not willing to permit its theatre patrons to be taken away by the non-permissive and non-compensated use of its copyrighted material, to acquire and create which it expended hundreds of thousands of dollars. The competition of television, to be fair, ought to be carried on with its own material, not with that created and owned by its competitors.

ARGUMENT.

I.

Parody Is No More Important Than Any Other of the Literary Arts. It Does Not Have Such a Preferred Legal Position as Would Entitle Parodists to Pirate Copyrighted Material in Circumstances Which Would Render Any Other Copier Liable for Copyright Infringement.

Parody, no doubt, is an ancient and socially valuable art. So are the other literary arts, such as the novel, the drama or serious scholarly writing, which have done their share in enlightening and entertaining the world. The practitioners of these arts advance learning and knowledge no less than parodists. They are entitled to at least as much encouragement and support at the hands of the law as the latter. Yet, if any one of them—the novelist or dramatist, for instance—were to copy substantial parts of the copyrighted photoplay here involved he would be an infringer. [*Universal Pictures Co. v. Harold Lloyd Corp.*, 9 Cir., 162 F. 2d 354, 360-361; *Sheldon v. Metro-Goldwyn Pictures Corp.*, 2 Cir., 81 F. 2d 49, 55-56, *cert. den., Metro-Goldwyn Pictures Corp. v. Sheldon*, 298 U. S. 669.]

What considerations of policy or social utility require that the parodist, but only he, be given a position of immunity from the operation of the Copyright Act not accorded anyone else? It cannot be that parody is so much more important in the scheme of things than any other form of literary, dramatic or scholarly expression. One need not deny parody a place of equality with these others in order to affirm that it has no preferred place. Nor can the answer be, as petitioners assert it is, that parody cannot live without that preference; for it can, as petitioners' own expert witness established and as an examination of

the art will show. That is so because there is much in any copyrighted work which is necessarily in the public domain and which, even during the copyright term, is free to the parodist as it is to all others. It is enough to enable him to make that identification with the work being parodied which, it is asserted, is essential to good burlesque. [See, Point II, *infra*.]

The answer clearly is not that the law confers the preference claimed. Neither the Copyright Act in terms nor the gloss which it has received at the hands of the courts requires or even permits such an extraordinary preference to be given the parodist. The true answer is the one given by the courts below—the parodist has the same standing as any other author in respect of what he may or may not take from the works of others.

First: Copyright secures to its proprietor the exclusive right, for limited times, to "copy and vend the copyrighted work . . . and to play or perform it in public for profit, and to exhibit, represent, produce or reproduce it in any manner or by any method whatsoever. . . ." [17 U. S. Code, sec. 1(a)(c).] The Act, therefore, necessarily proscribes copying or reproduction by another in any of "the various modes in which the matter of any publication may be adopted, imitated or transferred . . . ." [*Nutt v. National Institute*, 2 Cir., 31 F. 2d 236, 238.] So, by way of illustration, the copyright of a motion picture secures the right to remake it in any manner or by any method by which it may be exhibited, performed, represented or reproduced. [*Universal Pictures Co. v. Harold Lloyd Corp., supra*, 162 F. 2d at 374.] So, too, a copyrighted piece of statuary may not be reproduced as a lamp base, even though utilitarian objects as such are not

copyrightable. [*Stein v. Mazer*, 4 Cir., 204 F. 2d 472, 477-480, *affirmed*, *Mazer v. Stein*, 347 U. S. 201; *Stein v. Rosenthal*, S.D.Cal., 103 F. S. 227, 231, *affirmed*, 9 Cir., 205 F. 2d 633.] A dramatization of a cartoon strip infringes, notwithstanding the imitation was mere parody or burlesque. [*Hill v. Whalen & Martell*, S.D.N.Y., 220 Fed. 359, 360. See, also, *National Comics v. Fawcett Publications*, 2 Cir., 191 F. 2d 594, 603.] In short, rights secured by copyright are infringed by copying in any medium; for the purpose of the Act is to give the proprietor the exclusive right "to any lawful use of his property, whereby he may get a profit out of it . . ." [*King Features Syndicate v. Fleischer*, 2 Cir., 299 Fed. 533, 535-536; *Fleischer Studios v. Ralph A. Freundlich, Inc.*, 2 Cir., 73 F. 2d 276, 278, *cert. den., Ralph A. Freundlich, Inc. v. Fleischer Studios*, 294 U. S. 717.]

In the instant case, the right to remake "Gas Light" as a comedy, parody or burlesque, is just as exclusively Loew's as is the right to transform it into a novel or a musical comedy or any other form into which unauthorized transformation by another would admittedly be an infringement. The Copyright Act does not exclude any of these media from the embrace of the exclusive right which it confers. Acceptance of petitioner's contention, however, would require that an exclusion of parody be carved out of the Act by main force.[2]

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[2]Parody, having the ancient lineage which it has, was undoubtedly known to the Congress at the times the various copyright acts were adopted. Had an exception in favor of parody been desired it would have been a simple matter for the Congressional intention to have been expressed in the statute.

Second: While authority or comment upon parody as a defense *per se* is not abundant, what there is of it is consistent with the judgments below. For example, the unauthorized performance of substantial parts of a copyrighted song is an infringement, even though done as part of a parodied imitation of the singer who popularized the song. [*Green v. Luby*, C.C.N.Y., 177 Fed. 287. *Cf.*, *Green v. Minzenheimer*, C.C.N.Y., 177 Fed. 286, finding no infringement where the parody was confined to the performer's mannerisms and did not include any copyrighted material. *Cf.*, also, *Bloom & Hamlin v. Nixon*, C.C.Pa., 125 Fed. 977, 978.] Again, a dramatization of a copyrighted cartoon strip has been held an infringement notwithstanding the plea that it "was a mere parody or burlesque of the original and was so intended." [*Hill v. Whalen & Martell, supra*, 220 Fed. 359.] There is not even an intimation in the American decisions, so far as we have been able to discover, to the contrary of the proposition that parody, like any other copy or imitation, will infringe if it takes substantial copyrightable material from the original.[3]

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[3] A dictum in an English case [*Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261, 268], to the effect that a burlesque would not be an infringement if by independent labor and revision an original result were created, has been criticized as not representing the law of England. [See, 7 Halsbury's Laws of England (2d ed., Lord Hailsham) 567, saying: ". . . there can be no justification for a user of copyright material based upon a supposed right to abridge or burlesque. A burlesque may, of course, be no infringement because it does not reproduce any of the incidents of the play burlesqued, but only the plot in which there is no copyright . . ."]

Professional commentaries are not otherwise, despite petitioners' assertion [Pet. 16] that they are.[4] They rec-

[4]We are not unaware of the strictures made by Judge Yankwich, extra-judicially, upon the opinion of the District Judge at bar. [33 Canadian Bar Rev. 1130.] Those comments, by the Chief Judge of the trial court in which this case was decided, were made while the cause was still pending in the Court of Appeals; in fact, they were made at a time which enabled petitioners to make emphatic use of them in their briefs in the latter court. The Court of Appeals was not persuaded by them; and should not have been. Judge Yankwich's own rationalization of the doctrine of fair use supports the result reached at bar. According to him, the criteria which determine whether a use is fair are: (1) "the quantity and importance of the portions taken"; (2) "their relation to the work of which they are a part"; and (3) "the result of their use upon the demand for the copyrighted material." So, the use is not fair if the quantity taken is substantial; or if it is an important part of the work; or, if its use will reduce the demand for the original. [*Toksvig v. Bruce Pub. Co.*, 7 Cir., 181 F. 2d 664, 666-667; *Lawrence v. Dana*, C.C.Mass., 15 Fed. Cas. 26, 60-61 (Case No. 8136); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 6 Cir., 135 F. 2d 73, 84-85; *New York Tribune v. Otis & Co.*, S.D.N.Y., 39 F. S. 67, 68; *Broadway Music Corp. v. F-R Pub. Co.*, S.D.N.Y., 31 F. S. 817, 818.] Here, the parts taken were substantial; and they were important to each of the works since they made up a substantial part of each, without which there would have been neither photoplay nor television play [R. 84, Find. XII]. Reduction of demand for the original will in itself keep a use from being held fair; but it is not a necessary element of infringement. A copyright owner "may refrain from vending or licensing, and content himself with simply exercising the right to exclude others from using his property." [*Fox Film Corp. v. Doyal*, 286 U. S. 123, 127; *Leon v. Pacific Tel. & Tel. Co.*, 9 Cir., 91 F. 2d 484, 486-487; *Falk v. Donaldson*, S.D.N.Y., 57 Fed. 32, 36-37; *Macmillan Co. v. King*, D.C.Mass., 223 Fed. 862, 867-868; *Reed v. Holliday*, W.D.Pa., 19 Fed. 325, 327.] Furthermore, the potentiality for such reduction was present in the instant situation; for petitioners' play was intended for exhibition on television, which is a natural and lucrative medium for exhibition of photoplays such as "Gas Light". [For a discussion of the harm which parody can do to the original, see Kitchin, *Survey of Burlesque and Parody in English*, xvii, xix-xx.]

Judge Yankwich apart, the other commentators referred to by petitioners [Pet. 7, note **] seem to approve the result reached below.

ognize (with one possible exception) that parody or burlesque which takes substantial copyrighted material from the original infringes.[5]

Third: In the sense in which petitioners use the term "fair use"[6] the reference is to a doctrine which permits the use of some copyrightable material without express license when the use is within the scope of the purpose for which

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[5]Spring, *Risks and Rights*, pp. 177-178, 183, 186, adopts the same criteria advocated by Judge Yankwich [note 4, *supra*] and particularly emphasizes the quality and value, as well as the quantity of the material taken, as the test of fairness of use. Lindey, *Plagiarism and Originality*, p. 43, says that parody cannot lawfully be "a transparent cover-up for stealing." Weil, Ball and Amdur, all refer to the decisions which we have cited [Point I, *Second, supra*] and state their holdings in a way which indicates concurrence in the idea that what they call mimicry—and which from the cases cited is seen to be parody or burlesque—is not a defense to a charge of substantial appropriation. [Weil, *Law of Copyright*, p. 418, sec. 1097; Ball, *Law of Copyright and Literary Property*, pp. 291-292, 422; Amdur, *Copyright Law & Practice*, pp. 748-749, 759-762, 777.] The English commentators are even more incisive. For example, in Copinger and Skone James, *Law of Copyright* (8th ed. 1948), pp. 129, 131-132, the test in every case, it is said, is whether substantial copyrighted material has been used, so that "a work which slavishly used the plot and incidents of another would not be defensible under the cloak of burlesque." Similarly, in Clarke, *Copyright and Industrial Design* (1951), p. 63, it is said that burlesque "may be an infringement, the material question for consideration being whether a 'substantial part' of the copyright work is or is not reproduced."

DeWolf, *Outline of Copyright Law*, pp. 97, 142, citing no cases, does say that it "is well settled that parody is not an infringement of the right to copy. . . ." This comment, however, is prefaced by a statement of his view that the basis of fair use is implied consent; and that parody is a form of fair use. [See, also, note 7, *infra*.] No such consent can be fairly implied in the case at bar. There was, in fact, express dissent by the copyright proprietor. [R. 65-68; 84-85 (Find. XIV).]

[6]The term has been used in two somewhat different senses in the American cases. One of these, for which Judge L. Hand is responsible, refers to a taking of the uncopyrightable elements of a copyrighted work, *e.g.*, its general plot, theme or abstract ideas or

the copyrighted work was intended.[7] It does not permit of a substantial taking and it has never been extended to the point where it makes lawful "wholesale copying and publication of copyrighted material. . . ." [*Leon v. Pacific Tel. & Tel. Co., supra*, 91 F. 2d at 486.] To the contrary, a use is not fair if as a result of it the second author has done little more than "to save time, trouble and expense by availing himself of another's copyrighted work for the sake of making an unearned profit. . . ." [*Conde Nast Publications v. Vogue School*, S.D.N.Y., 105 F. S. 325, 333; *Toksvig v. Bruce Pub. Co., supra*, 181 F. 2d at 667; *Lawrence v. Dana, supra*, 15 Fed.Cas. at 62 (Case No. 8136); *Simms v. Stanton*, C.C.Cal., 75 Fed. 6. 10.] And certainly a use is not fair if thereby the rights of the original author are injuriously affected or the objects of his work superseded. [*Sampson & Murdock Co. v. Seaver-Radford Co., supra*, 140 Fed. at 541; *Mathews Conveyor Co. v. Palmer-Bee Co., supra*, 135 F. 2d at 85; *Baker v. Selden*, 101 U. S. 99, 102-103.] Nor is it fair if the quality and quantity of the material taken are substantial. [Cases cited, note 4, *supra*.]

If one writes a learned treatise or prepares a compilation, intended for the instruction of others or as a work

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conceptions. [*Sheldon v. Metro-Goldwyn Pictures Corp., supra*, 85 F. 2d at 54; *Towle v. Ross*, D.C.Ore., 32 F. S. 125, 127; *Warner Bros. v. Columbia Broadcasting System*, S.D.Cal., 102 F. S. 141, 148-149.] No question of fair use in that meaning arises at bar. The finding below was that substantial "*copyrightable* and copyrighted material" was taken. [R. 84 (Find. XII). Italics ours.]

[7]The doctrine, in fact, has been rationalized in terms of implied consent. [*Henry Holt & Co. v. Liggett & Myers Tob. Co.*, E.D. Pa., 23 F. S. 302, 304; *Towle v. Ross, supra*, 32 F. S. at 127; *Sampson & Murdock Co. v. Seaver-Radford Co.*, 1 Cir., 140 Fed. 539, 541.]

of reference, it is fair to assume that others in the field will make such a use of it. [See, *e.g.*, *West Pub. Co. v. Edw. Thompson Co.*, E.D.N.Y., 169 Fed. 833, 843, 857, *modified*, 2 Cir., 176 Fed. 833, 838.] Consequently, some greater leeway in determining what is a "substantial taking" may safely be allowed. [See, for example: *Webb v. Powers*, C.C.Mass., 29 Fed. Cas. 511, 516-517 (Case No. 17323); *American Inst. of Architects v. Fenichel*, S.D.N.Y., 41 F. S. 146; *Macmillan Co. v. King*, *supra*, 223 Fed. at 866.] So, too, one must expect that a published work will be reviewed and criticized and that, in connection with the review, parts may be quoted or paraphrased. [*Folsom v. Marsh*, C.C.Mass., 9 Fed. Cas. 342, 344-345 (Case No. 4901); *New York Tribune v. Otis & Co.*, *supra*, 39 F. S. at 68; *Hill v. Whalen & Martell*, *supra*, 220 Fed. at 360.] Uses such as these are fairly within the scope of the purpose for which the work was designed. They do not fill the same general need for which the original was produced. Such uses are quite another matter, however, from using the original material in another work of the same kind or genre and which may forestall public acceptance of the original.

In the case at bar it was the latter sort of use which was made of respondents' work by the petitioners. They produced a play or drama—comic to be sure, instead of serious as was the original—but nevertheless copied from respondents' play. They proposed to exhibit or represent it on television—a medium also adapted to exhibition of respondents' work, and over which that work could not be lawfully exhibited without respondents' license. Thus, had petitioners been successful in their design, they would have diluted, if not pre-empted, at least the television market for the original. To permit such a use would be

simply, under cover of a label, to do away with the rights intended to be secured by copyright.[8] That is not fair use in any sense of the term.

II.

The Argument That Parody Cannot Exist Without the Right to Appropriate Substantial Copyrighted Material Disregards the True Nature of Parody and Ignores the Law Which Denies Copyrightability to Plots, Themes and Ideas.

Petitioners' argument for importance, as well as their argument for a reversal,[9] rests solely on the supposed inability of parody to survive unless parodists have the right to take their material at large from copyrighted works. The argument is erroneous in its factual premise; and it involves a disregard of established copyright law.

The foundation of the argument is that parody needs to identify the original which is being taken off.[10] That

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[8]Suppose petitioners had performed respondents' play exactly as written and at length, achieving the effect of parody or burlesque simply by exaggerating or burlesquing the mannerisms, reading of lines, and acting techniques of the performers. Surely, infringement of the copyright in a dramatic composition is not dependent on the manner of rendition. Yet, petitioners' argument leads to that absurd test; for their defense, in essence, is that they merely performed comically that which was serious in the original.

[9]Realistically, the petition for certiorari presents nothing but a request for another review by the party defeated in the Court of Appeals. None of the required grounds upon which to base a certiorari is vouchsafed. Rather, the argument is devoted to the merits of the cause and the supposed error of the two courts below in its disposition. [See *Magnum Import Co. v. Coty*, 262 U. S. 159, 163.]

[10]We need not disagree with this proposition or with the distinguished President quoted by petitioners. [Pet. 8.] It may be noted, however, that Mr. Lincoln's complaint was not that the parody did not make the original recognizable to those who knew of it; but that *he* was unfamiliar with it.

identification can be made without plagiarizing. With respect to every copyrighted work, as Judge L. Hand among others has observed, some part of "its content [goes] to some extent into the public domain. . . ." [*Nichols v. Universal Pictures Co.*, 2 Cir., 45 F. 2d 119, 122, *cert. den.*, 282 U. S. 902.] That part is its plot or theme, its abstract ideas or conceptions, its general framework, as distinguished from the author's treatment and development of that theme, conception or framework. [*Dellar v. Goldwyn*, 2 Cir., 150 F. 2d 612, 613, *cert. den.*, 327 U. S. 790; *Sheldon v. Metro-Goldwyn Pictures Corp.*, *supra*, 81 F. 2d at 54; *Shipman v. R.K.O. Radio Pictures*, 2 Cir., 100 F. 2d 533, 538; *Harold Lloyd Corp. v. Witwer*, 9 Cir., 65 F. 2d 1, 19-20, 23-27; *Twentieth Century-Fox Corp. v. Dieckhaus*, 8 Cir., 153 F. 2d 893, 898-899.] In material of that sort, which copyright does not protect and which, therefore, is available to all, there is ample substance from which to fashion a recognizable identification with the work being parodied.

Furthermore, true parody "does not parallel [the original] in the sense that it just recreates the thing in a new tone, but takes off from it. . . . But [it] in no sense parallels the original." [R. 156.] That was the exact testimony of petitioners' expert—Dr. Baxter. Its significance is clear. Parody does not require slavish copying in a different mode; it does not require the pirating of substantial parts of the original. All that it needs, when it is genuinely parody and not merely a short-cut to supplying oneself with literary or dramatic material for one's own commercial purposes, is the plot, the conception, the ideas, or the central theme of the original. And all of

these are still open to the parodist just as they were before the decision of this cause.[11]

Finally, true parody is not always, nor need it be, a detailed copy of a specific work. It is much more often a lampoon of another's ideas or style, or of a school of thought or philosophy. [See, *e.g.*, R. 116, 118, 120-121, 129, 169-170. See, also, Kitchin, *Survey of Burlesque and Parody in English*, 1-10, 38-39, 49 *et seq.*, 152-153, 250-251.] To achieve such a lampoon one need never take from the original any more than that which anyone, before the decision at bar was, and is now still, free to take. "Style is of the essence of true parody." [Kitchin, *op. cit.*, 167.] The fear expressed by petitioners that the decision at bar will unduly restrict the genuine parodist is merely hyperbole.[12]

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[11]The point is aptly illustrated by the decision of the District Judge, before whom the instant cause was tried, in *Columbia Pictures Corp. v. National Broadcasting Co.*, S.D.Cal., 137 F. S. 348, 350-351, 352-353. There, a completely recognizable parody of the novel and photoplay "From Here To Eternity" was held no, to be an infringement because substantial *copyrightable* material was not taken.

[12]The real purpose behind the defense of the right of the parodist to take as he will from another's work, which has been made at bar, is laid bare when we recall the identities and the interests of the defenders. They are here: Jack Benny, a television and radio comedian who must each week or so have enough dramatic or comic material to fill out a program which he produces for profit and which competes with respondent Loew's photoplays for the patronage of the public; Columbia Broadcasting System, whose sole function is to sell time for commercial advertising purposes and for whom the entertainment program is simply a means of capturing an audience; and, that hitherto unsuspected patron of the arts, American Tobacco Co., manufacturers of Lucky Strike cigarettes. The claim of this oddly assorted cast that they were indulging in "criticism" of respondents' photoplay is, as the Court of Appeals said, itself "a parody upon the meaning of criticism." [R. 284-285.]

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1957.

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Petitioners,

vs.

LOEW'S, INC., and PATRICK HAMILTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS.

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I.

Neither the supposed necessity for appropriation of copyrighted material by parodists nor the purpose of promoting the progress of science and the useful arts requires destruction or dissipation of the exclusive rights secured by copyright 9

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IN THE

Supreme Court of the United States

October Term, 1957.

No. 90

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, and JACK BENNY,

Petitioners,

vs.

LOEW'S, INC., and PATRICK HAMILTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS.

Restatement of Question Presented.

The District Court found, and the Court of Appeals concurred in the finding, that petitioners copied substantial parts of the copyrightable and copyrighted material in respondents' motion picture photoplay into a filmed television play. Petitioners intended to televise, and but for the injunction herein would have televised that play nationally as part of a program advertising Lucky Strike cigarettes. Was it error, on those facts, to find and conclude that such copying was not a fair, but was an infringing, use of respondents' copyrighted material notwithstanding that

petitioners' play was in form a burlesqued presentation of respondents' photoplay?[1]

Supplementation of Petitioners' Statement of the Case.

Petitioners' statement of the case [Br., 3-6[2]] is substantially accurate. It needs, for completeness, some supplementation; and, for the sake of convenience, a summary of the District Court's material findings of fact in which the Court of Appeals concurred.

1. The petitioners are, and for a good many years have been, engaged jointly in a commercial enterprise—the advertising of Lucky Strike cigarettes over radio and television. [R. 56-57, 62.] To be effective their advertising campaign needs, of course, an audience to be subjected to the advertising message. That audience, in television advertising, is attracted by the presentation of entertainment programs which may be received and enjoyed in the viewers' homes. The advertising message or "commercial" is interpolated on several occasions during the presentation of the entertainment. Petitioner Benny

[1] Petitioners' statement of the question would make the holding below appear to have been that the so-called doctrine of fair use is never applicable to parody or burlesque. Neither lower court so held. What was held was that petitioners' use of respondents' copyrighted material, being qualitatively substantial and for competitive and commercial purposes, went beyond that permitted by the doctrine. So far as parody as such was concerned, the parodist, it was held, had the same right of fair use as any other author, but no greater right. [R. 232, 235-236, 240, 251-252, 282-284.] The question here, then, is not whether parody *may* be a fair use; no doubt in appropriate cases it may be. The question, rather, is whether, in the circumstances of this case, it *was* a fair use. That was a question of fact, resolved, on ample evidence, against the petitioners.

[2] The Brief of Petitioner is referred to herein by the abbreviation "Br."

"is recognized as one of the most highly expert performers in many fields of comedy." [R. 57.] He supplies the entertainment part of the Lucky Strike advertising program. [R. 56.] Petitioner CBS is a nationally known radio and television network whose programs are broadcast and telecast throughout the United States. It supplies the facilities and the air time for televising the Lucky Strike program. [R. 49, 62.] Petitioner American Tobacco Co. manufactures Lucky Strike cigarettes. [R. 49.] It sponsors the program and its products are advertised on it. [R. 56.] The infringing play "Auto Light" was prepared for presentation, and but for the injunction herein would have been presented, as one of the programs so designed to advertise Lucky Strikes. [R. 67-68, 69.]

2. An almost identical play, copied from respondents' copyrighted photoplay, had been presented several years before by Benny and American as a radio play over another network. [R. 62-63.] This was done in circumstances which impelled the District Court to find that it had been done with Loew's consent to that single performance. [R. 63-64, 80.]

3. On the occasion of the presentation by petitioners of their first television version of respondents' photoplay Loew's did more than merely inform CBS "that it had exclusive rights to the production of 'Gas Light' . . ." [Br. 4.] It asserted that petitioners' use of material from "Gas Light" in their television play was an infringement of its copyright; and that it would enforce its rights in the premises. [R. 66-67.] Thus, when petitioners essayed their second television attempt along these same lines, they were embarking upon a course of action which they knew was claimed by Loew's to be, and which might well

turn out to be, as it did, an infringement of Loew's copyright.[3]

4. When that which was appropriated from Gaslight is deleted from petitioners' play, nothing is left save a few disconnected and even incoherent "gags" or comic antics, telling no story and making no point. [Appendix "A", *infra.*] On the other hand, when the material which was added to the television play by petitioners is deleted, what is left tells in condensed form the essential story of "Gas Light" in the same way, with the same sequence of events and incidents as are found in the photoplay. [Appendix "B", *infra.* And, see, summary of the photoplay in the opinion of the Court of Appeals, R. 278-279.]

5. The essential findings of fact were to this effect:

a. The photoplay "Gas Light" was an original work, duly copyrighted. [R. 79-80.]

b. In October, 1945, Benny caused a radio play to be written by writers in his employ, which was copied in substantial part from "Gas Light." It was publicly performed over radio, as part of a program, sponsored by American, advertising its products. That performance was with Loew's permission which did not, however, extend beyond that specific performance. [R. 80.]

c. In January, 1952, the petitioners, without respondents' knowledge or permission, caused a tele-

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[3] In the face of these facts the denial by petitioners of any *animus furandi* sounds somewhat hollow. [See, *Campbell v. Scott*, 11 Sim. 31, 38, 59 Eng. Rep. 784; 787 (1842); *Scott v. Stanford*, L. R. 3 Eq. 718, 723 (1867); *Folsom v. Marsh*, 5 C. C. Mass., 9 Fed. Cas. (#4901) 342, 349 (1841).]

vision play to be written. It was copied in substantial part from the photoplay "Gas Light." The part so copied was a substantial part of the television play and of the copyrightable and copyrighted material in the photoplay. The television play was televised for profit by petitioners throughout the United States as part of a program advertising American's tobacco products. [R. 80-81.] Loew's informed CBS promptly that it considered this copying of its photoplay to be an infringement of its copyright. [R. 82.]

d. The program was reproduced on film, by means of which petitioners will be enabled to perform and exhibit it publicly on television, in motion picture theatres, or in any other places and before any other audiences in and before which motion pictures may or can be projected and exhibited. [R. 81.]

e. In May, 1953, CBS commenced the preparation of a motion picture entitled "Auto Light." It was designed and intended to be a remake of the earlier television play, to be publicly exhibited on television throughout the United States as part of a program starring Benny, sponsored by American, and advertising the latter's products. It, too, was reproduced on motion picture film. [R. 82, 83-84.] On learning of this plan, Loew's promptly notified petitioners that any repeat performance or remake of the earlier television play would be an infringement of its copyright in "Gas Light." [R. 82-83.] But for the injunction herein, this remake would have been publicly televised as and for the purpose planned. [R. 83-84.]

f. The second television play was copied in substantial part from "Gas Light" without petitioners' consent or license. The part so copied was a substantial part of the play and of the copyrightable and copyrighted material in the photoplay. [R. 84.]

g. Petitioners' use of respondents' copyright material was not a fair use thereof; nor was it made fair by reason of the fact that the material was used by way of burlesque or parody. [R. 85.]

Except as petitioners' argument may amount to an attack on the finding of unfair use last summarized, none of these findings was ever challenged below as unsupported by the evidence or as being "clearly erroneous." [See, F. R. C. P., rule 52(a).] All of them were concurred in by the Court of Appeals. [R. 281-282, 284.]

Summary of the Argument.

Without a copyright statute the rights of an author in his work do not survive its first publication. The rights secured by copyright are exclusive in nature and persist after publication for the term of copyright. These rights were designedly so fashioned in order to secure to authors, for limited times, all of the profit and reward which could be realized from their labors, thus giving them an incentive to publish and disseminate their works. This economic philosophy, which underlies the entire concept of copyright, cannot be ignored; nor can it be dissipated by destroying or relaxing the exclusivity of the rights granted.

It is not necessary, in order that parody or burlesque may continue to exist, to give parodists a broader privilege

of appropriating material from copyrighted works than authors generally have. The art is no more important than any of the other literary arts whose practitioners must respect the exclusive rights secured by copyright. Parody is not always or even mainly a slavish copy of some specific work. It is more often than not a burlesque of schools of thought, of style, of ideas, attitudes and causes, to the use of which copyright has never been a bar. Even when it is a lampoon of a specific work, those elements of the original—*i.e.* its ideas and intellectual conceptions, its theme, outline or plot—which are not protected by copyright, furnish ample material for fashioning a recognizable tie between the original and the parody. There is, therefore, no practical necessity for narrowing the exclusive rights secured by copyright in order to permit the parodist to function. Even if it were otherwise, the question of how far authors should be secured in the exclusive right to their writings in order to promote the progress of science and the useful arts is one of policy committed by the Constitution to Congress. The statute which has determined this policy makes no exception in favor of parodists. That statutory policy and the rule of law which embodies it cannot be changed by custom or usage.

The so-called doctrine of fair use is not a means of avoiding the exclusivity of copyright. It has never been extended to cover and immunize a taking of substantial copyrightable material for the purpose of earning a profit therefrom. It is, in fact, only a succinct way of referring to the proposition that unless the appropriation is sub-

stantial and of copyrightable material there is no infringement of copyright. In the instant case the taking was of substantial copyrightable material. That material was taken to serve petitioners' own commercial purpose—to advertise Lucky Strike cigarettes. It was taken for use in an entertainment medium which strongly competes with the motion picture business of the respondent copyright owner. And its use by petitioners forestalls respondents' exclusive right to remake their own play in any form or version including a comic one. Such a taking and use cannot properly be characterized as "fair."

Parody or burlesque stands on no different footing as respects "fair use." Parodists may take from other works to the same extent as other authors; but their privilege in this respect is no greater. To decide the contrary would require giving to parodists a preferred position over all other authors; and it would, under the guise of construction, make a non-exclusive right out of one which Congress, pursuant to the mandate of the Constitution, has expressly declared to be exclusive.

ARGUMENT.

I.

Neither the Supposed Necessity for Appropriation of Copyrighted Material by Parodists nor the Purpose of Promoting the Progress of Science and the Useful Arts Requires Destruction or Dissipation of the Exclusive Rights Secured by Copyright.

Permeating and coloring all of petitioners' argument are two basic propositions. The first of these is that parody cannot live except by feeding upon the meat of earlier works; so that if, by chance, these earlier works are protected by copyright the exclusive rights thereby secured cannot stand in the way of substantial appropriation. [Br. 9-11, 27-35.] The second of petitioners' postulates is that the copyright power was given Congress to "promote the Progress of Science and useful Arts," so that the copyright statutes must be interpreted in a way which will not prevent appropriation of copyrighted material by the practitioner of the parodist's art. [Br. 11-21.] Neither of these propositions will withstand critical analysis, as we propose to show.

A. Parody Does Not Need Appropriation of Substantial Copyrighted Material. It May Live as It Has in the Past By Only Such Appropriations as Are Open to All Authors.

We may lay on one side, for the moment, the question whether, even assuming petitioners' premise of necessity to be true, the conclusion sought to be derived therefrom can be accepted in the face of a statute granting *exclusive* rights in copyrighted material. [See, pp. 17 (n. 12), 27-

28, *infra*.] The fact is that the premise is not true. Parody as that art has been generally practiced, does not parallel the original which it takes off. It does not need, and seldom uses, substantial copyrightable material from the works of others. It can continue to live, as successfully as it has in the past, by the use of that which, even in a copyrighted work, is open to all to take.

For support of these assertions we need not go beyond the testimony of Dr. Baxter—petitioners' expert witness, to whose "beguiling dissertation" on parody the Court of Appeals referred. [R. 284.] Dr. Baxter summarized his views on the matter in this revealing and significant passage of his testimony [R. 156][4]:

> "Mr. Mitchell, I think that is a very excellent synonym for burlesque, take-off from something. It does not parallel in the sense that it just recreates the thing in a new tone, but it takes off from it, selectively, this element, this element, this element, in order to identify this is a burlesque that B is making of A, but it takes off into the blue with all sorts of things. It introduces extraneous materials; it takes one little detail and puffs it up beyond its significance in the original. It leaves out much, but it constantly comes back, so to speak, to refresh itself to the original, and then takes off again. But in no sense parallels the original."

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[4]The excerpt quoted was Dr. Baxter's summation of the point of his testimony at large. He had earlier testified as follows: ". . . Parody, as I see it, is the taking off of something . . . [it] calls attention to the form. . . . [R. 114.] "But like all burlesques, they tie in recognizably to the drift of the play they burlesque . . . ." [R. 131.] ". . . you take the thing and you take off from it . . . ." [R. 132.] "It isn't complete, it doesn't follow completely the whole chain, but enough. That is the way of burlesque. It ties in this event and another and is recognizable from the original, because it has enough points in common. It

For that kind of take-off, substantial copying of *copyrightable* material is wholly unnecessary. That is so because in every copyrighted work, even during the copyright term, there is some part that goes into the public domain. [*Nichols v. Universal Pictures Co.*, 2 Cir., 45 F. 2d 119, 121, 122 (1930), *cert. den.* 282 U. S. 902.] That part is its theme, situation, or plot, and its ideas or intellectual conceptions. [Cases cited, n. 5, p. 12, *infra*.] These, as Dr. Baxter testified, are the materials of parody or burlesque. These are the things from which is fashioned that tie to the original which, it is said, is so necessary to exercise of the art. Nothing in the decision of the case at bar has put any restriction on resort to these materials, either in "Gas Light" or in any other copyrighted work.

Dr. Baxter, as examples of the sort of thing he was talking about referred to "The Rehearsal" by the Duke of Buckingham, and "The Critic" by Sheridan. [R. 121, 123-124.] Here, perhaps unwittingly, he gave a perfect illustration of the very point we are now making. This becomes apparent upon a consideration of the following comments on those two works made by Lord Blackburn when *Chatterton v. Cave*, 3 App. Cas. 483, 501 (1878), was decided in the House of Lords:

> ". . . an idea may be taken from a drama and used in forming another without the representation of any part of the first. For example: —I have no

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doesn't follow the whole thing right through. I know of no burlesque which follows every point in the development of a work." [R. 135.] ". . . What it [burlesque] does take is the idea and then make a new character which is a monstrous joke on the other one. That is the way it has always been in burlesque." [R. 137-139.] ". . . the burlesque makes fun of the situation and the people and the theme . . ." [R. 143.] ". . . It concerns itself with parts, parts which it borrows because it is burlesquing. B is burlesquing A, and there are enough things borrowed to tie in the burlesque with the original." [R. 149.]

doubt that *Sheridan* in composing *'The Critic,'* took the idea from *'The Rehearsal,'* but I think it would be an abuse of language to say that those who represent *'The Critic,'* represent *'The Rehearsal,'* or any part thereof; and if it were left to me to find the fact, I should, without hesitation, find that they did not.

"On the other hand, in composing *'The Trip To Scarborough,' Sheridan* took so much from *'The Relapse,'* that if it were left to me to find the fact, I should find that those who represent *'The Trip To Scarborough,'* do represent parts of *'The Relapse.'"*[5]

A more modern example is the television burlesque by Sid Ceasar—another well known television comedian—of the novel and the motion picture "From Here To Eternity." The original was completely recognizable from the parody. Yet, because Ceasar stuck to those parts of the original which, conformably to ordinary principles of copyright law, were open to appropriation, Judge Carter, only a short time after he had decided the case at bar, held that copyright had not been infringed. There, unlike our case, substantial parts of the *copyrightable*

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[5]This distinction between what may and may not be lawfully taken from an earlier copyrighted work is now, of course, an accepted part of the law of copyright and literary property. [*E. g., Mazer v. Stein*, 347 U. S. 201, 217-218 (1954); *Holmes v. Hurst*, 174 U. S. 82, 86 (1899); *Baker v. Selden*, 101 U. S. 99, 102-103 (1879); *Dellar v. Goldwyn* (2d Cir., 1945), 150 F. 2d 612, 613, *cert. den.*, 327 U. S. 790; *Dymow v. Bolton* (2d Cir., 1926), 11 F. 2d 612, 613, *cert. den.* 327 U. S. 790; *Harold Lloyd Corp. v. Witwer* (9th Cir., 1933), 65 F. 2d 1, 19-20, 23-27; *Twentieth Century-Fox Corp. v. Dieckhaus* (8th Cir., 1946), 153 F. 2d 893, 898-899; *Fendler v. Morosco*, 253 N. Y. 281, 171 N. E. 56, 60 (1930); *Burtis v. Universal Pictures Corp* (1953), 40 Cal. 2d 823, 831, 835, 256 P. 2d 933, 939, 941.] It is a distinction which draws a line between the idea or intellectual conception and the author's expression of it; a line between the teaching of the work and the arrangement of the words which the author uses to impart that teaching. It is a line which many times may be difficult to draw; but it is a line which must be drawn in

elements of the original had not been taken. [*Columbia Pictures Corp. v. National Broadcasting Co.*, S. D. Cal., 137 Fed. Supp. 348, 350-351, 352-353 (1955).] Had petitioners here similarly confined themselves they would have been able, as parodists always have been, to accomplish their purpose without infringing upon the rights of others.[6]

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every plagiarism case. Judge Learned Hand has frequently and characteristically made this point. [See, *e. g., Nichols v. Universal Pictures Co., supra,* 45 F. 2d at 119, 121-122; *Sheldon v. Metro-Goldwyn Pictures Corp.* (2d Cir., 1936), 81 F. 2d 49, 54, *cert. den.* sub. nom. *Metro-Goldwyn Pictures Corp. v. Sheldon*, 298 U. S. 669; *Shipman v. R.K.O. Radio Pictures* (2d Cir., 1938), 100 F. 2d 533, 538.]

An early statement of this proposition in England is the following from the judgment of Willes, J., in *Millar v. Taylor*, (1769), 4 Burr. 2303, 2331, 98 Eng. Rep. 201, 216:

> ". . . all the knowledge which can be acquired from the contents of a book is free for every man's use: if it teaches mathematics, physic, husbandry; if it teaches to write in verse or prose; if by reading an epic poem a man learns to make an epic poem; he is at liberty.
>
> ". . . but multiplying copies in print is quite a distinct thing from all the book communicates. And there is no incongruity to reserve that right; and yet convey the free use of all the book teaches."

[6]". . . the target aimed at by the parodist is not always the poet whose dress he wears. Satire of current manners, politics, or morals may be conveyed by using parody. . . ." [17 *Encyc. Brit.* (1957), 333 (by Edmund G. V. Knox, Editor, *Punch*, 1932-49). Carolyn Wells in the Introduction to her *Parody Anthology* (1904) xxv, divides parody into three kinds: "word-rendering," "form-rendering," and "sense-rendering." So does Christopher Stone in *Parody* (Martin Secker, London), 38. With respect to the first of these, which comes the closest to direct copying of a specific work, Stone says: "The verbal parodist either chooses a poem which in style or metre suits a subject about which he is anxious to write humorously; or more commonly he chooses a subject which is suggested by a particular poem which he is anxious to burlesque. . . ." [Stone, *op. cit.*, 24] Kitchin, whom petitioners cite, commenting on Fielding's attempt to parody "*Pamela*" in "*Joseph Andrews*," dismisses it as first-rate parody because "there is no attempt to imitate the style of *Pamela* and style, we think, is of the essence of true parody. . . ." [Kitchin, *Survey of Burlesque and Parody in English* (Oliver & Boyd 1931), 167.]

The truth is, as Dr. Baxter's testimony demonstrates, and as a knowledge of the *genre* will confirm, parody seldom if ever parallels the original line-by-line or scene-by-scene.[7] It is not even always a parody of some specific work. It is more frequently than not a lampoon of ideas, of form and style, of schools of thought or philosophy, of social, political or intellectual attitudes and causes.[8] To

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[7]Of course, over the past thousand years or more there undoubtedly have been instances of parodies which more or less slavishly followed the original. We do not know why these instances went unchallenged by the offended authors. Perhaps it was, as Dr. Baxter testified, that parody of one's work is often taken as a sign of success and as a compliment. [R. 144-145, 150.] More likely, it was because, as one of the scholars relied on by petitioners has put it, "The lax copyright laws of the eighteenth century made not only imitation but even plagiarism feasible. . . ." [Shepperson, *The Novel in Motley*, (1936), 11.] In this country it was not until the 1909 revision of the copyright statutes that an abridgment or condensation of a work became an infringing use. [See *Story v. Holcombe*, (C. C. Oh., 1847), 23 Fed. Cas. (#13497) 171 *Stowe v. Thomas* (C. C. Pa., 1853), 23 Fed. Cas. (#13514) 201; Weil, *American Copyright Law* (1917), 73-74, Secs. 173-174.] Most direct parodies no doubt would have been defensible as a "condensation." [See, also, note 11, p. 15, *infra*.] Whatever the reason, the inaction of these others can have no adverse affect on the rights of those who do not acquiesce and, therefore, seek to vindicate their rights. [See, also, the cases at pp. 50-51, *infra*.]

[8]In his serious *apologia* for "The Tale Of A Tub," Swift said:

> ". . . some of those passages in this discourse which appear most liable to objection are what they call parodies, where the author personates the style and manner of other writers, whom he has a mind to expose."

The several prefaces to The Tale are themselves parodies of the then current practice of inserting dedicatory prefaces and of their frequently pompous and obsequious style, but no specific preface is parodied.

A modern and amusing example of a parody which does not depend upon any specific work is the following: [*Life*, May 7, 1957, p. 53]

> "In 1958 the hard 'c' would be replaced by 'k' . . . Not only would this klarify the konfusion in the minds of spellers but typewriters and linotypes kould all be built with one less letter. . . . In the subsequent blaze of publisity, it would be announsed

that type of parody—and it is by far the bulk of it—obviously nothing but the uncopyrightable elements of any specific work or group of works is needed[9].

Before leaving this subject, one other implication of petitioners' argument may be noticed. What they are seeking is not "fair use" as that term is generally understood. What they want is a preferred position over all other literary practitioners—and this, it may be added,

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that the troublesome 'ph' would henseforth be written 'f.' This would make words like 'fonograf' 20 persent shorter in print.

"By 1959 publik interest in a fonetik alfabet kan be expekted to have reatshed a point where more radikal prosedures are indikated. We would urge at that time the elimination of al double leters whitsh have always been a nuisanse and desided deterent to akurate speling.

"We would al agre that the horible mes of silent 'e's' in our language is disgrasful. Therfor, in 1961, we kould drop thes and kontinu to read and writ merily along as though we wer in an atomik ag of edukation. Since by this time it would be four years sins anywun had used the leter 'c' we would then sugest substituting 'c' for 'th.'

"Kontinuing ces proposals year after year, we would eventuali hav a reaili sensibl writen languag. By 1975 wi ventyur tu sa cer wud bi no mor uv ces teribly trublsum difikultis."

[9]Here, again, we may resort to Dr. Baxter's testimony in which he refers, along these lines, to parodies by Aristophanes, Peele, Beaumont, Shakespeare, Bret Harte, and Donald Ogden Stewart. [R. 118, 120, 121, 169-170.] He also said: "... Burlesque is rarely personal. It doesn't attack individuals, but rather modes, styles, forms, tendencies, or focuses upon one work." [R. 148.] "... burlesque likes to look at style, it likes to look at characterization, at the poetry, at the theme of a work of art." [R. 149.] Dr. Baxter had himself tried his hand at the art. The result, in the style but not the content of *Alice in Wonderland*, was a parody of literary tastes in the 1930s. [R. 184-186.] See, also, n. 6, p. 13, *supra*.

The first of the great English parodies seems to have been Chaucer's *Rime of Sir Thopas*. It was not aimed at any one work but at "the whole family of metrical romances. . . ." [Kitchin, *op. cit.*, 9]; it was "a burlesque of the long-winded mediaeval romances. . . ." [4 Encyc. Brit. (1957) 413.] Chaucer seized upon the defects of the romances—their long-windedness, their lack of a sense of proportion and their aristocratic tone—and made them the basis of his parody of the *genre*. [1 *Cambridge History of English Literature*, 314; 354.]

for the perfectly mundane purpose of being able to attract an audience to whom the virtues of Lucky Strike cigarettes may be broadcast.

Parody does not stand alone as a literary art for which use of some existing original work is necessary. Abridgements or condensations, translations, dramatizations of novels, novelization of dramas, are some other examples. They are as of ancient lineage as parody; certainly they are as well established today.[10] They are as important to the spread of knowledge and the progress of science and the useful arts as parody. Yet no one would for a moment suppose or argue, in the face of the exclusive rights conferred by copyright, that a copyrighted novel, without the author's consent, could be substantially copied or transformed by another into an abridgement or a play or an operetta, or even a comic version of the original.[11]

Actually, the argument for a right of free appropriation could be made in behalf of the conventional literary arts with as much force as it is made here for parody.

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[10]A glance at any newsstand will show a number of mass-circulation media which consist wholly, or in part, of abridgements of longer current works. For example, there are such magazines, as Reader's Digest, Omnibook, and Science Digest. And one may readily recall, as another example, the abridgement of Sir Winston Churchill's recent works in Life. So, too, many of the now popular paper-backs are abridged editions of the originals. Of course, copyright of the original prevents such a use without consent of the copyright owner. [Cases cited, pp. 27-28, *infra*.]

[11]There was a time when such things could be done, because the scope of statutory copyright was much narrower than it now is. It was, for instance, not until 1842 in England [5 and 6 Vict., c. 45. See, *Colenan v. Wather*, 5 T. R. 245, 101 Eng. Rep. 137 (1793); *Reade v. Conquest*, 9 C. B. (N.S.) 755, 142 Eng. Rep. 297 (1861)], and 1856 in this country that a novelist was given the exclusive right to perform his copyrighted work [Act of August 18, 1856, 11 Stat. 138, c. 169]; and it was much later that he got the sole right to dramatize the work. [Generally, see, *Ferris v. Frohman* (1912), 223 U. S. 424, 432-435.] Until the revision of the copyright stat-

Surely, the novel, the drama, the biography, the history, and all other forms of instructive, or even merely entertaining, writing are at least as important to the spread of knowledge as parody. Yet those who turn their efforts in that direction must respect the exclusivity which copyright confers upon the earlier workers in the same field. What is the reason of social policy or utility which demands that the parodist, but he alone, be allowed a greater freedom to forage in other's preserves?[12]

The notion of exclusive right, for limited times, is implicit in the very concept of copyright. Without it copyright is an ineffective instrument with which to

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utes in 1909 it was not an infringement of copyright to make, without the author's consent, a bona fide abridgement of a published work. [See cases cited, n. 7, p. 14, *supra*.] All this has been changed, now that we have a copyright statute designed to give to the copyright proprietor the exclusive right "to any lawful use of his property, whereby he may get a profit out of it. . . ." [*King Features Syndicate v. Fleischer* (2d Cir., 1924), 299 Fed. 533, 535-536; *Fleischer Studios v. Ralph A. Freundlich* (2d Cir., 1934), 73 F. 2d 276, 278, *cert. den.* 294 U. S. 717. And, see, *Mazer v. Stein*, *supra*, 347 U. S. at 208-211; *Washingtonian Pub. Co. v. Pearson* (1939), 306 U. S. 30, 36. See, also, note 12, p. 17, *infra*.]

[12]The extent to which, in order to promote progress of science and the arts, the exclusive right of authors should be made something less than exclusive is a determination of policy for the Congress. [*Cf.*, H. Rep. No. 2222, 60th Cong. 2d Sess, 6; *Bleistein v. Donaldson Lithog. Co.*, 188 U. S. 239, 251 (1903).] The Copyright Act of 1909 was adopted after extended hearings at which the views of all interests were put before Congress. [H. Rep. No. 2222, 60th Cong. 2d Sess., 3.] The resulting statute was deliberately designed to enlarge the reach of copyright and to adapt it to modern conditions [H. Rep. No. 2222, 60th Cong., 2d Sess., 1]; in short, to give the copyright owner the right "to any lawful use of his property, whereby he may get a profit out of it. . . ." [*King Features Syndicate v. Fleischer*, *supra*, 299 Fed. at 535-536.] Parody or burlesque, its position and relative importance in the arts, and its inherent needs, were as well known then as they are now. Had it been intended to give parodists a greater freedom of appropriation than that which authors generally would have, "Congress doubtless would have said so." [*Cf.*, *United States v. Borden Co.* (1939), 308 U. S. 188, 201.]

accomplish its social purpose. The great paradox of copyright law is that on the one hand it is desirable that the ideas and discoveries of the ingenious and the learned should be available for the instruction and utilization of all; on the other hand is the hard fact that unless authors can be secured in the right to profit from their works after publication, there will not be the fullest of incentives to create new works, and there will exist a strong deterrent to publishing and generally disseminating those that are created. [Compare Lord Mansfield's comment in *Sayre v. Moore* (1785), 1 East. 361 n., 39 Eng. Rep. 139 n.]

That paradox is solved by the device of copyright: by the notion of an *exclusive* right for a *limited* time. In that way the reward of their ingenuity and labor is secured to authors by giving them a reasonable time in which they, alone, may seek to realize that reward; after that time has elapsed their improvements become the common property of all. That is certainly the solution adopted by our Constitution (Art. I, sec. 8) and the statutes enacted conformably thereto. [See, pp. 20-26, *infra*.]

Once we accept the right of parodists to appropriate at will and without limit from a copyrighted work, an equal right to other authors cannot in logic be refused. Yet in that way lies the destruction of the whole concept of copyright. Petitioners' argument, however attractively it may be dressed, is really an argument against the notion of copyright. Whatever may be said *a priori* for such a point of view, acceptance of it is forestalled. This country is committed by its Constitution to the proposition that copyright, in the sense of an exclusive right for a

limited time, is, if not a necessary, at least a desirable, adjunct of a literate society.[13]

The blunt truth about petitioners' case is that they are seeking, not a fair use, but an advantage which no other class of authors has or can have under existing law. That advantage cannot be justified by any argument of necessity. The necessity which petitioners urge simply does not exist. Parody has never needed, it does not now need, the right to take that which for the "limited times" prescribed by the Constitution and the copyright statutes belong exclusively to another.

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[13]Compare, Holmes, J., concurring, in *White-Smith Music Co. v. Apollo Co.* (1908), 209 U. S. 1, 19:

> ". . . [Copyright] restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time, and therefore, I may remark in passing, it is one which hardly can be conceived except as a product of statute, as the authorities now agree.
>
> "The ground of this extraordinary right is that the person to which it is given has invented some new collocation of visible or audible points,—of lines, colors, sounds, or words. The restraint is directed against reproducing this collocation, although but for the invention and the statute any one would be free to combine the contents of the dictionary, the elements of the spectrum, or the notes of the gamut in any way that he had the wit to devise. The restriction is confined to the specific form, to the collocation devised, of course, but one would expect that, if it was to be protected at all, that collocation would be protected according to what was its essence. . . ."

The same thought, more briefly and informally stated, is found in a letter of June 26, 1894, to Sir Frederick Pollock. [*Holmes-Pollock Letters* (Howe ed. 1941), 53.]

B. The Policy Imported by the Copyright Clause of the Constitution Enjoins Preservation Rather Than Destruction of the Exclusive Rights Secured by Copyright; for That Clause Seeks to Bring About the Progress of Science and the Useful Arts Through the Means of Securing to Authors the Exclusive Right to the Profits and Rewards of Their Labors.

There is, of course, not the slightest doubt that the copyright power was designed to "promote the progress of science and useful arts . . ." [*U. S. Const.*, art. I, sec. 8.] But of equal importance in the constitutional mandate is the method by which the desired object is to be attained. It is "by securing for limited times to authors . . . the exclusive right to their respective writings . . ." [*Idem.*]

It does not serve the constitutional policy to subvert that method by destroying or dissipating the "exclusive right" which the Congress sought to secure. An appreciation of the contemporary context in which the copyright clause came into being will lead, in fact, to a conclusion just the opposite from that which petitioners draw. The concept of copyright is economically motivated; it is the method which, by giving to the author the profit from his work, is designed to attain the desired promotion of the arts.

This Court has only recently said as much in *Mazer v. Stein, supra*, 347 U. S. at 219:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial

days devoted to such creative activities deserve rewards commensurate with the services rendered."

History, when looked at in slightly more detail than petitioners have seen fit to do, fully supports that view.

First: The comment upon the copyright power made by James Madison, to which petitioners give only passing reference [Br. 14], was this: [*The Federalist*, No. XLIII. (Madison.)]

> "The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged, in Great Britain, to be a right of common law.[14] The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress."

This comment takes on pointed significance when the laws passed by the individual states, and the role of Madison and the Continental Congress in that process, are examined.

On March 10, 1783 the Continental Congress appointed a committee, consisting of Madison, Hugh Williamson and Ralph Izard, "to consider the most proper means of cherishing genius and useful arts through the United States by securing to the authors or publishers of new books their property in such works." [24 *Journals of the Continental Congress* (Govt. Print. Off.) 180.[15].]

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[14]Most likely a reference to *Millar v. Taylor* (1769), 4 Burr. 2303, 98 Eng. Rep. 201, and its sequel in the House of Lords, *Donaldson v. Becket* (1774), 4 Burr. 2408, 2 Bro. 129, 1 Eng. Rep. 837, 98 Eng. Rep. 257.

[15]Hereinafter referred to as "*Journals*."

On March 26, 1783, a letter from Joel Barlow "respecting the copyrights of authors", with which was a copy of the Connecticut Act of January 8, 1783, was referred to this committee. [24 *Journals*, 211.]

The Connecticut Act—apparently the first copyright statute in this country,—contained the following preamble [*Copyright Laws* 1783-1952, (Copyright Office, 1953), 1[16]]:

> "Whereas it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind . . . ."[17]

On May 2, 1783 the Continental Congress adopted a resolution recommended by the committee to whom the matter of copyright had been referred. The committee reported that it was "persuaded that nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce . . ." It, therefore, recommended adoption of a resolution requesting the states to enact laws securing authors in the right to their works. [24 *Journals*, 325.]

Within three years of that resolution every state, except Delaware, had done so. [*Copyright Laws*, 4-21.] Each of these laws secured to authors of new works, for

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[16]Hereinafter referred to as "*Copyright Laws*."

[17]The Connecticut Act, significantly enough, was adopted "at the solicitation of Noah Webster, who desired copyright protection for his spelling book. . . ." [House Rep., No. 2222, 60th Cong., 2d Sess., 2.]

a limited time, the sole and exclusive right of printing, publishing and vending their works. All of them, save two (South Carolina and Virginia), carried a preamble of the same general tenor as the one found in the Connecticut Act—preambles, which plainly expressed the economic philosophy "which lies behind the concept of copyright."[18]

Second: The common law right of authors, with which Madison and, no doubt, his collaborators in the Constitutional Convention were familiar,[19] was a *perpetual*

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[18]The preamble to the Massachusetts Act, with which the Acts of New Hampshire and Rhode Island were virtually identical, read, in this regard, as follows: [*Copyright Laws*, 4, 8, 9]

"Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: As the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of this study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labour of his mind:

"Therefore, to encourage learned and ingenious persons to write useful books for the benefit of mankind:"

The preamble to the Georgia Act, also found in almost the identical form in the New York Act, was this: [*Copyright Laws*, 17, 19]

"Whereas the principles of natural equity and justice, require that every author be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings, which may do honor to their country, and service to mankind:"

The other acts similarly placed emphasis on the profit motive as a means of encouraging the publication of books. [*Copyright Laws*, 5 (Maryland), 6 (New Jersey), 10 (Pennsylvania), 15 (North Carolina).]

[19]Story, speaking of the copyright clause, has said that it "was doubtless to this knowledge of the common law and statutable rights of authors and inventors, that we are to attribute this constitutional provision. . . ." [2 Story, *Commentaries on the Constitution of the United States* (5th ed.), 83, sec. 1152.] See, also: *Burrow-Giles Litho. Co. v. Sarony* (1884), 111 U. S. 53, 58.

right so long as the work remained unpublished. Once published, however, and absent a copyright statute, the right was entirely lost and the work became at once available to all for any and every use cared to be made of it. [See, *Wheaton v. Peters*, 8 Pet. 590 (1834), *passim*; *Mazer v. Stein*, *supra*, 347 U. S. at 214-215; *Caliga v. Inter Ocean Newspaper*, 215 U. S. 182, 188 (1909); *Fashion Originators Guild v. Federal Trade Com.*, 2 Cir., 114 F. 2d 80, 83 (1940) *affirmed* 312 U. S. 457; *Loew's Inc. v. Superior Court*, 18 Cal. 2d 419, 421, 115 P. 2d 983, 984-985 (1941); and compare, *Donaldson v. Becket*, *supra*, 2 Bro. at 144-145, 4 Burr. at 2408-2417, 1 Eng. Rep. at 846-847, 98 Eng. Rep. at 258-262.]

Obviously, this state of the law must have been a deterrent to publication and general dissemination of the writings of learned men. Just as obviously, to the extent that works remained unpublished, the benefit to the public, from a knowledge of the information, the ideas and the instruction which they could impart, remained unrealized. What was needed was an incentive, not alone to the creation of new books, but to their general publication and circulation.

Thus we get an insight into what was behind the statement, in the early copyright statutes of the states, of a purpose to "encourage men of learning and genius to publish their writings . . ." [Conn. Act. of Jan. 8, 1783, p. 22, *supra*. See also the equivalent expressions in the other statutes referred to; pp. 22-23, *supra*.] Publication had to be shorn of its right-destroying consequences; otherwise the desire to create and to publish could be nullified by an unwillingness to suffer those con-

sequences.[20] From that purpose springs the device of securing to an author, upon and after publication, his exclusive right. In that way, by increasing publication and consequent dissemination, the progress of science and the useful arts is promoted. Along with that benefit to the public, the ultimate public interest is protected by limiting the exclusive right in time. [See, pp. 17-19, *supra*.]

Third: This was the background against which the copyright clause of the Constitution was framed and enacted. Significantly enough, the suggestion for a copyright power came to the Constitutional Convention from Madison, with whom Charles Pinckney joined. The suggestion of both of them was for a power "to secure to literary authors their copyright for a limited [or, per Pinckney, 'certain'] time . . ." Madison added, by way of method, "to encourage by premiums and provisions, the advancement of useful knowledge and discoveries." [Warren, *The Making Of The Constitution* (1928), 625, n. 1; 5 Eliot, *Debates on the Federal Constitution*, 439-440.] These suggestions resulted in a draft

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[20]Story, explaining the reason for the copyright power, has said: [2 Story, *Commentaries on the Constitution of the United States* (5th ed.), 84, sec. 1152]

> "... And authors would have little inducement to prepare elaborate works for the public, if their publication was to be at large expense, and, as soon as they were published, there would be an unlimited right of depredation and piracy of their copyright. . . ."

In the judgment of Willes, J., in *Millar v. Taylor*, *supra*, 4 Burr. at 2335, 98 Eng. Rep. at 218, we find this:

> "It is wise in any state, to encourage letters, and the painful researches of learned men. The easiest and most equal way of doing it, is, by securing to them the property of their own works. . . .
>
> "A writer's fame will not be the less, that he has bread, without being under the necessity of prostituting his pen to flattery or party, to get it.
>
> "He who engages in a laborious work, (such, for instance, as Johnson's Dictionary,) which may employ his whole life, will do it with more spirit, if, besides his own glory, he thinks it may be a provision for his family."

in the form in which it now exists in the Constitution. It was adopted without debate or opposition. [5 Eliot, *op. cit.*, 510-512.]

As Madison's comment in *The Federalist*, page 21, *supra*, shows, the purpose of the clause was well understood. So, too, was the method by which that purpose was to be accomplished. The purpose was "to promote the progress of science and the useful arts." The method —and it is perhaps well to note that it is the only method prescribed—was "by securing for limited times to authors . . . the exclusive right to their respective writings . . ." The economic philosophy behind the method was thus brought to bear upon the social objective to be attained. In any consideration of the scope and meaning of the copyright statutes, and of the exclusive rights which they confer, the economic philosophy of the clause in the Constitution can no more be ignored or blurred than can the ultimate goal which that clause sought to reach.

The teaching of history, we submit, is not that the exclusive right of authors should by construction be made non-exclusive. It is, rather, that the right should be maintained, for the limited time for which it is granted, as the exclusive right it is said in the Constitution and the statute to be.[21] [See, *American Tob. Co. v. Werckmeister*, 207 U. S. 284, 291, 299 (1907); *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127-128 (1932).]

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[21] History was recognized and given its just due by the Congress in the 1909 revision of the copyright statutes. That is clear from the reports of the House and Senate Committees on Patents which reported out the bill that is now law. [House Rep., No. 2222, 60th Cong., 2d Sess., 6. The Senate report was identical.] Petitioners quote all but one significant sentence of this section of the reports. [Br., 15-16.] Immediately at the end of their quotation the following should be added:

". . . The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly."

II.

Petitioners' Appropriation of Substantial Copyrightable Material for Their Own Commercial Purposes Cannot Be Justified as a Fair Use of Respondents' Copyrighted Dramatic Work.

The exclusive rights conferred by statutory copyright are broad enough and precise enough to proscribe the use of respondents' photoplay which petitioners have made. Those rights include the exclusive right to copy and vend the work; to exhibit, perform or reproduce it in any manner and by any method; and to make any transcription or record of it by which it may be exhibited, performed, presented or reproduced. [17 U. S. C., §1(a)(c)(d).]

The language in which these rights are expressed in the statute reads directly on what petitioners have done. They copied a substantial part of the work; they transcribed or recorded it on motion picture film, with which it can be exhibited, performed and represented; and it is precisely an exhibition and representation of it to the public at large which they propose to make. [R. 83-84.] Not alone a literal reading of the statute but as well its obvious sense compels the conclusion that this conduct was an infringement of respondents' copyright. [*Sheldon v. Metro-Goldwyn Pictures Corp., supra*, 81 F. 2d at 55-56; *Sheldon v. Metro-Goldwyn Pictures Corp.* (2d Cir., 1939), 106 F. 2d 45, 52, *affirmed* 309 U. S. 390; *Universal Pictures Co. v. Harold Lloyd Corp.* (9th Cir., 1947), 162 F. 2d 354, 360-361; *Anschl v. Puritan Phar. Co.* (8th Cir., 1932), 61 F. 2d 131, 137-138, *cert. den.* 287 U. S. 666; *Nutt v. National Institute* (2d Cir., 1929), 31 F. 2d 236, 238.]

As the breadth of the statutory language indicates, the medium in which the appropriated material is used makes no difference. The protection afforded by copyright proscribes copying in any of the "various modes in which matter of any publication may be adopted, imitated, or transferred with more or less colorable alteration. . . ."[22] [*Nutt v. National Institute, supra,* 31 F. 2d at 238; *King Features Syndicate v. Fleischer, supra,* 299 Fed. at 535; *Lawrence v. Dana* (C. C. Mass., 1869), 15 Fed. Cas. (#8136) 26, 59-60. Compare, *Mazer v. Stein, supra,* 347 U. S. at 218.]

The result which was brought about by the application of these principles to the facts here involved cannot be avoided by resort to the so-called doctrine of fair use. The argument that it can, leads to an absurdity. Respondents' rights in the photoplay "Gas Light" include the exclusive right to remake it in any form or version, including, if desired, a comic or burlesque version of it. [*Universal v. Harold Lloyd Corp., supra,* 162 F. 2d at 373-374.] Yet, if petitioners' contention is accepted, that supposedly "exclusive" right—at least as regards a burlesque version—is no different from that of any other member of the public. If petitioners may lawfully do what they did, so may anyone else. Thus, respondents'

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[22]For example: A cartoon strip may be infringed by a dramatization, notwithstanding that the dramatic imitation "was a mere parody or burlesque of the original, and was so intended" [*Hill v. Whalen & Martell* (S. D. N. Y., 1914), 220 Fed. 359, 360]; a piece of statuary by a lamp base [*Stein v. Mazer* (4 Cir., 1914), 204 F. 2d 472, 477-480, *affirmed* sub. nom. *Mazer v. Stein, supra,* 347 U. S. 201]; a cartoon character by a doll [*King Features Syndicate v. Fleischer, supra,* 299 Fed 533] or by a motion picture dramatization [*National Comics v. Fawcett Publications* (2d Cir., 1951), 191 F. 2d 594, 603]; a novel or a play by a motion picture dramatization. [*Sheldon v. Metro-Goldwyn Picture Corp., supra,* 81 F. 2d at 55-56.]

"exclusive" right would not be exclusive at all. It would be only a privilege shared by the whole world. [See, *Wetherby & Sons v. International Horse etc. Exch.* (1910), 2 Ch. 297, 303.[23]].

An examination of the decisions which have spelled out the so-called doctrine will confirm the foregoing analysis.

A. An Unauthorized Taking of Substantial Copyrightable Material Is Not Fair Use.

First: So-called "fair use" is not an excuse for the appropriation of substantial copyrighted material. No case can be found to support the proposition that "wholesale copying and publication of copyrighted material can ever be fair use . . ." [*Leon v. Pacific Tel. & Tel. Co., supra,* 91 F. 2d 486.] Actually, the term "fair use" is no more than a convenient way of referring to the proposition that copyright is not infringed unless the taking goes substantially beyond the uncopyrightable elements of the work.

The question in any case, Judge Learned Hand has pointed out, "is whether the part so taken is 'substantial,' and therefore not a 'fair use' of the copyrighted work . . ." [*Nichols v. Universal Pictures Corp., supra,* 45 F. 2d at 121]; and, again, ". . . 'copying' might at

[23]In this case the plaintiff's work listed names, pedigrees and other information about a considerable number of race horses. Defendant copied plaintiff's compilation of the names of the horses, adding certain other information about them. In holding this an unfair use, it was pointed out that the plaintiff could have done the same thing; and that to uphold the defendant's contention that he could avail himself of the plaintiff's labors in compiling the list of horses would put the copyright proprietor, in respect of his own work, "in no better position . . . than any other of His Majesty's subjects."

times be a 'fair use'; but it is convenient to define such a use by saying that others may 'copy' the 'theme,' or 'ideas,' or the like, of a work, though not its 'expression.' . . . ." [*Sheldon v. Metro-Goldwyn Pictures Corp., supra,* 81 F. 2d at 54.] One "may copy less than a material part of a copyrighted book, *i.e.*, he may make a fair use of it." [*West Pub. Co. v. Edward Thompson* (E. D. N. Y., 1909), 169 Fed. 833, 861, 862, *modified and affirmed* (2d Cir., 1910), 176 Fed. 833. See, also, *Towle v. Ross* (D. C. Ore., 1940), 32 F. Supp. 125, 127, n. 4; *Warner Bros. Pictures v. Columbia Broadcasting System* (S. D. Cal., 1951), 102 F. Supp. 141, 148-149.]

The English usage is in accord. There, for example, it has been said that ". . . . if the quantity taken be neither substantial nor material, if, as it has been expressed by some Judges, a 'fair use' only be made of the publication, no wrong is done and no action can be brought . . . ."[24] [*Chatterton v. Cave, supra,* 3 App. Cas. at 492.] In short, as one student of the subject has put it, "Much of the doctrine of unfair use, so-called, will, then, appear on examination to be mere aspects, either evidentiary or substantive, of the law of infringe-

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[24]Perhaps the earliest comment in this regard is that of Lord Eldon in *Wilkins v. Aikin* (1810), 17 Ves. 422, 424, 34 Eng. Rep. 163, 164: "There is no doubt that a man cannot under the pretence of quotation, publish either the whole or part of another's work: though he may use, what is in all cases very difficult to define, fair quotation. . . ." It is plain, not alone from this excerpt but also from the tenor of Lord Eldon's judgment as a whole, that he used "fair quotation" in contrast or opposition to publishing a "part," meaning by the latter, a substantial or material part. [See, in that regard, *Hawkes & Son v. Paramount Film Service, supra* [1934] Ch. at 605-606.]

ment by copying . . ."[25] [Weil, *American Copyright Law* (1917), 439, §1156.]

Notwithstanding that expressions in some of the decisions may seem to import the distinction which petitioners draw, the results reached belie the language used. Whether the case be one of plagiarism in the usual sense, where the test is "substantiality," or one where "fair use" in its supposed narrow and technical sense is at issue, the courts apply the same criteria to determine whether there has been infringement. [See, *e.g., Mathews Conveyer Co. v. Palmer-Bee Co.* (6th Cir., 1943), 135 F. 2d 73, 84-85, where this expressly appears.]

In that regard courts look to one or more of the following: (1) the quantity and quality of the parts taken; (2) the nature and object of the selections made and (3) the degree to which their use may prejudice the demand for or the profits from the original. [*Folsom v. Marsh* (C. C. Mass., 1841), 9 Fed. Cas. (#4901) 342, 348; *Lawrence v. Dana* (C. C. Mass., 1869), 15 Fed. Cas. (#8136) 26, 60; *Story v. Holcombe, supra,* 23 Fed. Cas. (#13497) at 173; *New York Tribune v. Otis & Co.* (S. D. N. Y., 1941), 39 F. Supp. 67, 68; *M. Whitmark & Sons v. Pastime Amuse. Co.* (E. D. S. C., 1924), 298 Fed. 470, 476-477; *Anschl v. Puritan Phar. Co., supra,* 61 F. 2d at 137; *Meccano, Ltd. v. Wagner* (S. D. Ohio, 1916), 234 Fed. 912, 922; *National Institute v. Nutt* (D. C. Conn., 1928), 28 F. 2d 132,

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[25] Petitioners differentiate that usage from the "doctrine of fair use" strictly so called. [Br. 19n.] We confess to having made a similar differentiation below. Further reflection, sharpened by an attempt to frame a generalization of the doctrine which would fit all the cases, has convinced us that we were wrong. In either context the term denotes no more than that not enough has been taken from the work to constitute infringement, the test of what is enough being the same in both.

135, *affirmed sub nom. Nutt v. National Institute* (2d Cir., 1929), 31 F. 2d 236; *Smith v. Chatto* (1874), 31 L. T. N. S. 775, 776. See, also, the cases cited notes 26, 27, pp. 32, 33, *infra*.]

The "fair use" cases, strictly so-called, bear out this analysis. They do not uphold copying of substantial copyrightable material as a fair use; but they do find a fair use when the part taken is not substantial or material.[26] An early example is *Simms v. Stanton* (C. C. Cal., 1896), 75 Fed. 6, 11, 17, in which it was held that the defendant, having adopted the teaching of plaintiff's work on "physiognomy" (*i.e.*, its uncopyrightable element), but having taken nothing else to any "substantial degree," had made a fair use of the original. The court quoted from Drone's treatise on copyright to the effect that while the copyrighted work could be used "as a guide or instructor" copying therefrom "to a material extent"

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[26] This proposition is illustrated by the turn which the law in this regard has taken in England. There, the Copyright Act of 1911 provides that the author has the sole right to reproduce the work or any substantial part thereof [1 and 2 Geo. 5, c. 46, sec. 1(2)]; and that infringement consists of doing without consent anything the owner has the sole right to do, but that "Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary" is not infringement. [1 and 2 Geo. 5 c. 46, sec. 2(1), subs. (i).] As a matter of statutory construction the "fair dealing" proviso has been held to change the law so as to permit a substantial appropriation in the cases falling within its scope. [*Johnstone v. Bernard Jones Publics.* [1938] 2 All E. R. 37, 40.] In cases arising before the 1911 Act, and in those arising after its enactment but, because of the purpose for which the appropriation was made, not within the fair dealing proviso, the rule is, as it was before, that a substantial appropriation infringes. [*Hawkes & Son v. Paramount Film Service* [1934] Ch. 593; *Wetherby & Sons v. International Horse, etc., Exch., supra* [1910] 2 Ch. at 305; *H. Blacklock v. C. Arthur Pearson, Ltd.* [1915] 2 Ch. 376, 383; *Campbell v. Scott* (1842), 11 Sim. 31, 38, 59 Eng. Rep. 784, 787; *Lewis v. Fullarton* (1839), 2 Beav. 6, 8-9, 48 Eng. Rep. 1080, 1081. Generally, see, 8 *Halsbury's Laws of England* (3d ed. Lord Simonds, 1954) 433, sec. 786, quoted at pp. 46, 47, *infra*.]

would be piracy. Other illustrative fair use cases in which the result was made to depend on whether substantial copyrightable material had or had not been taken are cited in the margin.[27]

A "substantial" part of a copyrighted work need not be all of it. It is substantial if it is an important part of the work; one which gives it some significant literary or dramatic value. [See, for example: *Universal Pictures Co. v. Harold Lloyd Corp., supra,* 162 F. 2d at 360, holding the taking of one sequence of a motion picture to be substantial because it was "intimately tied into the story, and [was] a main source of comedy for the picture as a whole . . ."; *De Acosta v. Brown, supra,* 146 F. 2d at 410, holding a fictional love interest interpolated into an otherwise factual biography intended for motion picture use, was substantial notwithstanding it was only a small part of the biography, because a love interest was an important part of stories designed for the motion picture public; *Henry Holt & Co. v. Liggett & Myers Tob. Co., supra,* 23 F. Supp. at 303, holding three sentences, about the effect of tobacco on the throat, in a medical treatise, to be substantial because they represented the gist of what was pertinent to that subject in the treatise and were an important part of the tobacco advertisement into which they were copied.]

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[27] *Toksvig v. Bruce Pub. Co.* (7th Cir., 1950), 181 F. 2d 664, 666-667; *Leon v. Pacific Tel. & Tel. Co., supra,* 91 F. 2d at 486; *De Acosta v. Brown* (2d Cir., 1944), 146 F. 2d 408, 410, *Associated Music Publishers v. Debs Memorial Radio Fund* (2d Cir., 1944), 141 F. 2d 852, 855, *cert. den.* 323 U. S. 766; *Reed v. Holliday* (W. D. Pa., 1884), 19 Fed. 325, 327; *Henry Holt & Co. v. Liggett & Myers Tob. Co.* (E. D. Pa., 1938), 23 F. Supp. 302, 303-304; *Gilmore v. Anderson* (C. C. N. Y., 1889), 38 Fed. 846, 849; *MacMillan Co. v. King* (D. C. Mass., 1914), 223 Fed. 862, 866-867; *Toole v. Ross* (D. C. Ore., 1940), 32 F. Supp. 125, 127; *Farmer v. Elster* (C. C. Mich., 1888), 33 Fed. 494, 495-497.

A fortiori, an appropriation so great that the copy supersedes or becomes a substitute for the original would be substantial. But limits of permissible taking are passed long before that point is reached as the cases cited above sufficiently demonstrate. Petitioners' effort to make the "substitute" test the only criterion [Br. 46-49] simply ignores the course of decision. [See, also, the cases cited at note 34, p. 40, *infra*, which hold that substantial copying infringes even though the copy does not reduce the demand for the original or compete with it.]

Second: In the case at bar it was found that the petitioners copied substantial parts of the copyrightable and copyrighted material in respondents' photoplay. [R. 84.] The finding is not challenged. Copying to that extent is not a fair use, in either of the two senses of the term to which petitioners refer. That finding, therefore, compels affirmance.[28]

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[28]The finding cannot be said to be "clearly erroneous." [*Adamson v. Gilliland* (1917), 242 U. S. 350, 353; *United States v. Yellow Cab Co.* (1949), 338 U. S. 338, 341-342; *United States v. National Ass'n.* (1950), 339 U. S. 485, 495-496.] Infringement "does not depend so much upon the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages they take from it that in which its chief value consists. . . ." [*Story v. Holcombe, supra*, 23 Fed. Cas. (#13497) at 173.] Here, petitioners have taken from the photoplay much more than its general theme or ideas. They have taken its major sequences and incidents by which that theme was developed and without which the photoplay would have been nothing. By the same token, without those sequences and incidents the infringing play was nothing. [Appendices "A" and "B," *infra*. See, also, pp. 4, 33, *supra*.] A taking of that sort is substantial, and infringing. [*Universal Pictures Co. v. Harold Lloyd Corp.*, *supra*, 162 F. 2d at 360; *MacDonald v. DuMaurier* (2d Cir., 1944), 144 F. 2d 696, 701; *De Acosta v. Brown*, *supra*, 146 F. 2d at 410; *Sheldon v. Metro-Goldwyn Pictures Corp.*, *supra*, 81 F. 2d at 54-56.]

B. Petitioners' Use of Respondents' Material Was Not for Purposes of Review or Criticism but for the Purpose of Commercial Advertising. Such a Use Is Not Fair.

First: The purpose served by the appropriated parts, in the original or in the copy, will play an important role in the determination of fair or unfair use. [Cases cited, pp. 31-32, *supra*.] That is particularly so in the utilitarian type of works, such as directories, reference works and similar compilations, in respect of which the issue of fair use, in petitioners' sense of that term, most frequently arises.

Works of that sort are written and published to be used more extensively than by a mere reading and an assimilation of their teaching. So long, therefore, as the user keeps fairly within the scope of the use for which such a work was designed, there can be no reasonable ground of complaint.[29] Even then, a use cannot be con-

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[29]Some illustrative cases: Using a law digest to obtain citations to source material is fair; but *contra*, when a substantial part of the compiler's original text, such as syllabi, commentaries and notes are taken [*West Pub. Co. v. Edw. Thompson Co.*, *supra*, 176 Fed. 833, 838; *Callaghan v. Myers* (1888), 128 U. S. 617, 659-662; using a form of contract from a form book in an actual transaction is fair [*American Inst. of Arch. v. Feinchel* (S. D. N. Y., 1941), 41 F. Supp. 146] but not when copied into another form book [*Brightly v. Littleton* (C. C. Pa., 1888), 37 Fed. 103]; some slight, but not a substantial quotation of dictionary definitions may be a fair use [*Webb v. Powers* (C. C. Mass., 1847), 29 Fed. Cas. (#17323) 511, 516-517]; using a scientific treatise or a compilation to verify one's own research may be fair [*Jarrould v. Houlston* (1857), 3 K. & J. 708, 715-716, 69 Eng. Rep. 1294, 1297-1298; *Kelly v. Morris* (1866), L. R. 1 Eq. 697, 701-702]; but not when the "verification" extends into copying. [*Chapman v. Ferry* (C. C. Ore., 1883), 18 Fed. 539, 542-543.]

Occasionally, a holding of fair use has been explained as based on consent inferred from the nature of the original work. [*Sampson & Murdoch Co. v. Seaver-Radford Co.* (1st Cir.), 140 Fed. 539, 541-542; *Karll v. Curtis Pub. Co.* (E. D. Wis., 1941), 39 F. Supp. 836, 837-838. *Toole v. Ross*, *supra*, 32 F. Supp. at 127.]

sidered fair if the second comer in the field has done little more than "to save time, trouble and expense by availing himself of another's copyrighted work for the sake of making an unearned profit . . . ." [*Conde Nast Publics. v. Vogue School* (S. D. N. Y., 1952), 105 F. Supp. 325, 333; *Leon v. Pacific Tel. & Tel. Co., supra*, 91 F. 2d at 486-487; *Toksvig v. Bruce Pub. Co., supra*, 181 F. 2d at 667; *Walter v. Steinkopff* [1892] 3 Ch. 489, 494-495; *Ager v. Peninsular etc. Navig. Co.* (1884), 26 Ch. D. 637, 642:]. Thus, the purpose for which the appropriation is made will significantly affect the question whether more than is open has been taken—especially when that purpose is to promote the copyist's business.[30]

Second: In the case at bar respondents' work was not utilitarian in nature. It was not designed for any use by others going beyond a view of its public performance. The parts of it which went into petitioners' play made up the essence of the photoplay. They *were* the photoplay, for without them there was no story. There can be no

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[30] *E. g.*, Quotation in a cigarette advertisement of an excerpt, dealing with the effect of tobacco on the throat, from a medical treatise, was not a fair use, at least when the excerpt, though short, was qualitatively a substantial part of the treatise and of the advertisement. [*Henry Holt & Co. v. Liggett & Myers Tob. Co., supra*, 23 F. Supp. at 303-304]; performance of a part of a musical composition for purpose of building up a listening audience for a radio station is unfair [*Associated Music Publishers v. Debs Memorial Radio Fund, supra*, 141 F. 2d at 853]; reproduction of a newspaper editorial on a presidential candidate would be unfair, if done as publicity for commercial reasons [*New York Tribune v. Otis & Co., supra*, 39 F. Supp. at 687]; copying the essence of a fashion magazine cover into a brochure advertising the copyist's school for models, unfair [*Conde Nast Publics. v. Vogue School, supra*, 101 F. Supp. at 333].

question, therefore, that the copied parts were substantial. [See, note 28, p. 34, *supra*.]

The literary property for the photoplay was acquired and the script of the picture was developed at the cost of a very large expenditure of time and money. [R. 53.] Petitioners saved themselves the expenditure of equivalent cost and effort [R. 70-71] by the simple expedient of taking petitioners' result, condensing it in volume, and adding to it a few perfectly obvious inversions of a comic nature. They did this for their own profit; for the purpose of getting the entertainment or dramatic material they needed to attract an audience to whom the message of Lucky Strike could be delivered. [See, *Associated Music Publishers v. Debs Memorial Radio Fund, supra*, 141 F. 2d at 855.] Decisions of the sort to which reference has already been made, pp. 35-36, *supra*, stamp that kind of use for such a purpose as unfair.

Third: Petitioners seem to appreciate the force of this argument. At any rate, they seek to avoid its effect by the claim that what they did was "criticism." [Br. 22-23, 25-26.] Neither court below put much stock in that contention. The Court of Appeals, indeed, disposed of it almost contemptuously with the remark that the contention "would seem to be a parody upon the meaning of criticism."[31] [R. 283-284.]

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[31] The point was not specifically mentioned in the opinion of the District Judge. He was, however, fully aware of, and discussed, the privilege of fair comment or criticism. [R. 235-236.] His finding that the use here involved was not fair [R. 85] must, therefore, be taken as a rejection of the contention. [See, *Clyde Equipment Co. v. Adorito* (9th Cir., 1926), 10 F. 2d 106, 107; *Triangle Conduit, etc., Co. v. Fed. Trade Comm.* (7th Cir., 1948), 168 F. 2d

Reasonable quotation for purposes of review or criticism may, of course, be a fair use. [*Hill v. Whalen & Martell, supra,* 220 Fed. at 360; *Story v. Holcombe, supra;* 23 Fed. Cas. (#13497) at 173; *Folsom v. Marsh, supra,* 9 Fed. Cas. (#4901) at 344-345; *N. Y. Tribune v. Otis & Co., supra,* 39 F. Supp. at 68.] But the review or criticism must be a bona fide criticism, intended as such; not merely a cover for a substantial appropriation made to further one's own commercial purposes. The American cases cited above so indicate, and at least one other so holds. [*Sayers v. Spaeth* (S. D. N. Y., 1932), Cop. Off. Bull. No. 20, 625, 626.] The English cases are quite specific on and to this point.[32] [*Campbell v. Scott, supra,* 11 Sim. at 38, 59 Eng. Rep. at 787; *University of London Press v. University Tutorial Press* [1916] 2 Ch. 601, 613-614; *Smith v. Chatto, supra* (1874), 31 L. T. N. S. at 776-777; *Johnstone v. Bernard Jones Publics., supra* [1938] 2 All E. R. at 41, 49-50.[33]]

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[32]For instance, the excerpt at p. 30, *supra,* from *Chatterton v. Cave, supra,* 3 App. Cas. at 492, to the effect that unsubstantial quotation would be fair use, was directed to the question of the length to which a reviewer of a copyrighted book could go in quoting or reproducing parts of it.

Appropriation for purposes of criticism need not go to the point of superseding the original or being a "substitute" for it before the use becomes unfair. That has been made clear in England since the cases cited by petitioners were decided. [Br. 46-47.] In *Bohn v. Bogue* (1846), 7 L. T. (o. s.) 277, 278, the "substitution" rule of *Roxorth v. Wilkes* (1807), 170 Eng. Rep. 889, was confined to its particular facts, with the comment that "it is perfectly clear . . . [it] can never be the true criterion. . . ." See, also, the quotation from Clarke, pp. 48-49, *infra;* and the cases cited p. 33, *supra.*

[33]Petitioners quote from *Bell v. Whitehead,* 8 L. J. N. S. 141, on this subject. [Br. 25-26.] Immediately at the end, and as part of the paragraph quoted (petitioners indicate no elision), the following should be added:

> ". . . The insertion of such extracts, moreover, tends to extend the sale of the works reviewed. The case before me is also very distinguishable from the case of a work being given

The courts below in the instant case were certainly warranted in finding that petitioners were not engaged in a bona fide review or criticism of "Gas Light" but were engaged in using a substantial part of it for their own profit. The following facts clearly support that finding [*Cf., Walter v. Steinkopff, supra* [1892] 3 Ch. at 495]:

1. The use was a repetitive one, having occurred twice before. [R. 80-82.]

2. It was a use made almost ten years after the work allegedly being reviewed had been produced, exhibited and withdrawn from exhibition in this country. [R. 53-54, 56, 57.]

3. It was a use designed to be an important and necessary part of a program advertising petitioner American's cigarettes. To maintain that campaign—which was not a sporadic affair, but one carried on by television broadcasts at regular intervals—it was necessary to have for each program some form of dramatic or entertainment material. [R. 56-57, 62, 80-82.]

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in a cheaper form, by a stranger, than the original work costs the proprietor. . . ."

In our case, petitioners present their program to the viewing public free of charge. The usual theatre admission would have to be paid to view respondents' photoplay.

The real ground of decision in *Bell v. Whitehead* was that what we would call an injunction *pendente lite* would be dissolved and the plaintiffs left to their "remedy at the hands of a jury . . ." since "the value of the extract is very minute and trifling" as was the injury to the plaintiffs. This in itself "would be sufficient to induce the Court not to interfere. . . ." [8 L. J. N. S. at 142.] In this regard it may be noted that about that time in England, an injunction *pendente lite* usually ended the litigation in copyright matters; so that unless the plaintiff's right was perfectly clear, Chancery was loath to interfere. [See, *Wittingham v. Wooler* (1817), 2 Swans. 428, 430, 36 Eng. Rep. 679, 680.]

4. Customarily and frequently that material took the form of parody or burlesque of the dramatic and literary works of others. [R. 57-62.]

From these facts the courts below were at the very least entitled to infer that petitioners' purpose was not criticism but advertising; and that any critical flavor inherent in their play was wholly incidental and of no consequence to them. Such an inference was not negated merely because the form of the work was parody. To be sure, parody is frequently an explicit or an implicit criticism of the original. It does not follow that it is always so. Nor does it follow that its critical tone can never be overshadowed by an overriding purpose which has no relation to criticism. [Compare, *Henry Holt & Co. v. Liggett & Myers Tob. Co., supra,* 23 F. Supp. 302 where a quotation from a medical treatise in a cigarette advertisement was held an unfair use.]

C. Petitioners' Use Was Injurious to Respondents. An Injurious Use Cannot Be a Fair Use.

A use of copyrighted material which is injurious to the copyright owner is a substantial and, therefore, an infringing use.[34] The courts have frequently said that an important criterion of fair use is the extent to which

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[34] A use, even though it does not produce any injury or damage, may nevertheless be unfair. The right of the copyright owner to exclude others is absolute [*Fox Film Corp. v. Doyal, supra,* 286 U. S. at 127], so that it is immaterial that the infringement does not reduce the demand for his work, compete with it, or otherwise injure him. [*Leon v. Pacific Tel. & Tel. Co., supra,* 91 F. 2d at 486-487; *Johns & Johns P. Co. v. Paull, etc., Corp., supra,* 102 F. 2d at 283; *Warren v. White, etc., Mfg. Co.* (S. D. N. Y., 1930), 39 F. 2d 922, 923; *MacMillan Co. v. King, supra,* 223 Fed. at 867-868; *Falk v. Donaldson* (S. D. N. Y., 1893), 57 Fed. 32, 36-37; *Hartford Print. Co. v. Hartford Direct. etc., Co.* (C. C. Conn., 1906), 146 Fed. 332, 335; *Reed v. Holliday, supra,* 19 Fed. at 327; *Wetherby & Sons v. International Horse, etc., Exch., supra* [1910] 2 Ch. at 305.]

the second work may tend to supersede the objects or diminish the profits or value of the original.[35] Conversely, the absence of competition between the two works will some times, but not necessarily, lead to a conclusion that the taking has not been substantial or unfair. [See, *W. H. Anderson Co. v. Baldwin* (6th Cir., 1928), 27 F. 2d 82, 89; *Karll v. Curtis Pub. Co., supra,* 39 F. Supp. at 837; *Sampson & Murdock Co. v. Seaver-Radford Co., supra,* 140 Fed. at 541-542.]

The case at bar is not of the latter class. Injury to the respondents was a plainly inferable fact on the instant record. In the first place, there is the circumstance that the right of the copyright owner to make its own comic or burlesque version of its work was forestalled and the market for such a version pre-empted to a substantial extent by petitioners. [*Cf., Bradbury v. Hotten* (1872), L. R. 8 Ex. 1, 6, 7;[36] *Wetherby & Sons v. International Horse etc. Exch., supra* [1910] 2 Ch. at 305.]

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[35]*E. g., Mathews Conveyor Co. v. Palmer-Bee Co., supra,* 135 F. 2d at 85; *Universal Pictures Co. v. Harold Lloyd Corp., supra,* 162 F. 2d at 361; *Hill v. Whalen & Martell, supra,* 220 Fed. at 360; *Greene v. Bishop* (C. C. Mass., 1858), 10 Fed. Cas. (#5763) 1128, 1134; *Lawrence v. Dana, supra,* 15 Fed. Cas. (#8136) at 60; *Story v. Holcombe, supra,* 23 Fed. Cas. (#13497) at 173; *Simms v. Stanton, supra,* 75 Fed. at 9-10; *New York Tribune v. Otis & Co., supra,* 39 F. Supp. at 68; *Folsom v. Marsh, supra,* 9 Fed. Cas. (#4901) at 344-345.

[36]In *Bradbury* the defendant in a biography of Napoleon III included several caricatures of Napoleon which had appeared in Punch. They were included in that part of the biography described as "The Story of His Life As Told By Popular Caricaturists." In finding an unfair and, therefore, an infringing, use the Chief Baron (Kelly) and Pigott B. placed considerable emphasis on the fact that Punch itself could have chosen, or it could still choose, to republish its caricatures as part of a history of Napoleon or of his times; so that defendant's use was an injurious invasion of that right, as it could very well tend to cause "many, who would otherwise have bought, to refrain from buying such a work."

There is the further fact that petitioners' use of respondents' material is designed for exhibition over television; and it has been reproduced in a form which makes it adapted to exhibition in motion picture theatres as well. [R. 80-84.] It is common knowledge that television, with its spate of free entertainment conveniently viewable in the home, has made serious inroads upon attendance at motion picture theatres. Thus, there was shown the basis for an inference of actual competition between petitioners and respondent Loew's; and of the existence of potential direct competition in the theatres themselves. No doubt Loew's must suffer competition from television in general, as well as from other entertainment media. But when the competition is sought to be carried on against it by means of its own copyright material, it is stretching language and sense to the point of travesty to call it fair. [*Cf., International News Service v. Associated Press* (1918), 248 U. S. 215, 239-240.]

Finally, in this connection, there could be, potentially, a serious effect on demand for the original, because of the absurd impression of its merit created by petitioners' broad burlesque. Customarily, successful motion pictures, such as "Gas Light," are reissued. [R. 56, 55.] In the several years since its last exhibition in this country, a new motion picture audience has grown up. Having regard to the mass circulation attained by television programs as popular as those of petitioner Benny, it is a fair conclusion that millions of these people would see his burlesque if it were permitted to be exhibited. Many of them might well have a less keen desire to see the original after viewing the burlesque. [*Cf., Hill v. Whalen & Martell, supra*, 220 Fed. at 360, making this very point in respect of a burlesque dramatization of a popular car-

toon strip. See, also, Kitchin, *op. cit.*, xvii, xix, xx, where the harm that parody can do to the original is discussed.]

In all of this there was ample foundation for the inference that petitioners' use of respondents' copyright work was injurious to the latter. When that is so, the use cannot be held fair.

D. A Parody or Burlesque Is No Exception to the General Rule of Unfair Use.

Petitioners defend parody or burlesque as being, in effect, a species of the genus fair use. One would expect, therefore, that decision in any given case would depend upon application of the general principles to which we have referred. That is, in fact, what has happened in the few cases which have dealt with the subject. When there was an appropriation of substantial copyrighted material, the use was held unfair notwithstanding the defense of parody or burlesque. [*Hill v. Whalen & Martell, supra,* 220 Fed. 359; *Green v. Luby* (C. C. N. Y., 1909), 177 Fed. 287.] On the other hand, when the appropriation was unsubstantial or of copyright material which the plaintiff did not own, the opposite result was reached. [*Green v. Minzenheimer* (C. C. N. Y., 1909), 177 Fed. 286; *Bloom v. Hamlin & Nixon* (C. C. Pa., 1903), 125 Fed. 977.[37]]

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[37]In *Bloom* the gist of the decision is found in this excerpt from the opinion: "... Surely a parody would not infringe the copyright of the work parodied, merely because a few lines of the original might be textually reproduced. No doubt the good faith of such mimicry is an essential element; and, if it appeared that the imitation was a mere attempt to evade the owner's copyright, the singer would be prohibited from doing in a roundabout way what could not be done directly. . . ." [125 Fed. at 978.] In *Minzenheimer* the plaintiff had no proprietary interest in the only copyrighted material involved.

Petitioners pass these cases off as not involving parody or burlesque but only "mimicry" in which the copyrighted material was not textually parodied.[38] [Br. 43-44.] The fact is, however, that in the *Hill* case there was an attempted burlesque of the copyrighted work; and the copying was defended as such.[39] And in *Green v. Luby*, while there was no parodied variation of the text of the copyrighted song, the song was used as a vehicle for a parody or burlseque of the plaintiff's performance of it, with a resulting determination that there had been infringement.

Be that as it may, if petitioners' distinction is a valid one they have distinguished themselves out of the defense upon which they rely. For here, their parody was achieved, not by a variation of the copyrighted text, but by a burlesqued representation of it. The quality of humor or of burlesque in their television play does not arise from such textual changes as they may have made in respondents' material, or in that material itself, as a reading of their script will show. [Appendix "B", *infra*.] It arises from the manner in which that material is performed—from the exaggerations and inversions of mannerisms, postures, stage business, and intonations of voice, introduced into its performance. If, as petitioners argue, exactly that sort of device in the *Luby* case was not parody or burlesque, it was not in the case at bar; and the whole structure of the defense falls to the ground.

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[38]It seems reasonably plain from the general tenor of the opinions in these cases that the word "mimicry" was used in its ordinary meaning of "ridicule by imitation."

[39]Petitioners say it was as "palpable a steal as could be imagined. . . ." [Br. 44.] Having regard to the finding of substantial copying in the case at bar the same characterization could be made of their use of "Gas Light."

If, on the contrary, such a performance is burlesque, the *reductio ad absurdum* of petitioners' argument is readily perceived. According to them, a burlesque of a copyrighted work would be a fair use regardless of the extent to which the original was followed and reproduced. Suppose, then, that a copyrighted drama were performed in its entirety and exactly as written, line-for-line, scene-for-scene; but with comical exaggerations of mannerisms, postures and the like.[40] In that situation there would be no doubt whatever that an infringing performance or representation of the play had been made. [*Cf.* Br. 49.] And if that is true for such a performance, it must also be true of a performance of less than all but a substantial part of it. The nature and substance of what has been taken, not the manner of its performance, determines infringement.

Petitioners find themselves in no better case with the English decisions to which they refer. [Br. 40-42.] In *Glyn v. Western Features Film Co., Ltd.* [1916] 1 Ch. 261, the comment of Younger, J., about burlesque was not the ground upon which his judgment was made to depend; and it is not generally regarded as stating the law of England on the subject of burlesque. What was actually decided in *Glyn* was, first, that the parts taken from the copyrighted novel were "exceedingly few in number or importance" so that as a "conclusion of fact" there was no infringement ([1916] 1 Ch. at 267-268); and, second, that the novel was so immoral as not to be copyrightable. It is clear, therefore, that the case involved only an unsubstantial taking. That would not have been an infringement even if it had not been burlesqued.

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[40] Seriously intended dramas of an older vintage are today not infrequently burlesqued in exactly this way.

In any event the comment was clearly dictum, as Judge Younger himself noted by twice remarking that it was unnecessary to the decision. ([1916] 1 Ch. at 268, 269.) And he was wrong in his view of the law which accounted, in his mind, for the absence of any case holding burlesque to be an infringement. ([1916] 1 Ch. at 268.) The law of England in that regard is correctly summarized thus, in 8 *Halsbury's Laws of England* (3d ed. Lord Simonds, 1954), 433, §786:

> "Copyright is a proprietary right, and its infringement is actionable without proof of damage; if, therefore, a substantial part of an author's work is taken, it is not material to inquire whether the user is fair or unfair, or whether the two publications are or are not, likely to enter into competition with one another . . . ." [See, also an additional quotation from this work, p. 47, *infra*.]

The most significant part of the discussion in *Glyn*, however, is the reference to *Hanfstaengl v. Empire Palace* [1894] 3 Ch. 109, and *Francis, Day & Hunter v. Feldman & Co.* [1914] 2 Ch. D. 728, 734. In each of those cases it was held, as a determination of fact, that the copy bore so little resemblance to the original that infringement could not be found; in other words, that a substantial part of the original had not been copied.[41] That is the

[41] Neither of these cases involved burlesque as such; and there is no discussion of the subject in them. *Hanfstaengl* was concerned with a newspaper sketch of some tableaux. The tableaux were live reproductions of some copyrighted paintings. In an earlier litigation it had been held that the tableaux did not infringe the copyright. [*Hanfstaengl v. Empire Palace* [1894] 2 Ch. 1.] The copy therefore was not a copy of the original but of another, non-infringing copy. *Francis, Day & Hunter* involved a claim of copying of the lyrics of a copyrighted song. The question to which the attention of counsel and the court was mainly directed, however, was whether there had been such a publication in England as to secure copyright.

approach in England to the question of burlesque as fair use, as it is in this country. [Authorities cited, pp. 47-49, *infra.*]

Of the decision in *Carlton v. Mortimer,* MacGillivray Copyright Cases, 1917-23, 194, we have only a brief summary; there is no official or verbatim report of the case. That summary, however, as quoted by petitioners [Br. 42] sufficiently shows that, burlesque or no, the judgment was grounded upon the unsubstantiality of the taking of "two trifling incidents . . . ."[42] The case, therefore, fits into our view that whether copying by way of burlesque will infringe depends on the qualitative nature of the appropriation. It fits in too with the views of English commentators who have discussed the problem. For example:

> ". . . . Younger, J.'s view [in *Glyn*] was not the basis of his judgment. It would appear that at any rate since the commencement of the Copyright Act, 1911 (1 and 2 Geo. 5, c. 46), whereby reproduction in any material form was made an infringement of copyright there can be no justification for a user of copyright material based upon a supposed right to abridge or burlesque. A burlesque may, of course, be no infringement because it does not reproduce any of the incidents of the play burlesqued, but only the plot in which there is no copyright . . . ."
>
> 8 *Halsbury's Laws of England* (3d ed. Lord Simonds, 1954), 433, §786, note (*d*).

"It is thought that the question whether abridgments [etc.] infringe copyright must now depend

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[42]The defendant had for years performed an original comic acrobatic skit. After the publication of "Tarzan and the Apes" he inserted two incidents, described in the report as "trifling," which were similar to two in the novel.

upon the answer in each case to the question whether the production has involved a substantial use of copyrighted material or only ideas and information.

* * * * * * * *

"Similar considerations seem to arise whether a burlesque can be an infringement. If the burlesque consists of what is, in substance, a new work parodying an existing one but not making substantial use of its language or incidents, it is submitted there is no infringement. But a work which slavishly used the plot and incidents of another would not be defensible under the cloak of burlesque."

Copinger & Skone James, *Law of Copyright* (8th ed., 1948), 129, 131-132.

"The Court held [in *Carlton v. Mortimer, supra.* p. 47] that these two incidents did not constitute a substantial part of the novel, especially in view of the fact that whereas the incidents in the novel were serious in nature, in the skit they were treated entirely as burlesque. This case raises the question of whether a burlesque can infringe a serious work. It is submitted that it may be an infringement, the material question for consideration being whether a 'substantial part' of the copyright work is or is not reproduced.

* * * * * * * *

". . . the decision [in cases of quotation for purposes of criticism] would depend it is thought, upon the nature of the publication, *i.e.*, upon whether the object of the newspaper was genuinely to criticize the works, or whether under guise of criticism the real object was unfairly to derive profit from the reproductions as such. Whether a burlesque could constitute a fair dealing for the purposes of criticism cannot be answered in the abstract, but must also,

it is thought, depend upon similar principles applied to the particular case."

Clarke, *Copyright & Industrial Design* (1951), 63, 83.

The American commentators cited by petitioners [Pet. 45-46] are readily disposed of. The quotation from 13 C. J. 1113, 1118, is based entirely on the *Glyn* case. [See, pp. 45-47, *supra.*] In the revised edition the quoted statement seems to have been dropped, since it does not appear in the corresponding sections of the work. [18 C. J. S. 215, 219, §94a, c(3).] Weil's comment is based on *Hill v. Whalen & Martel, supra,* 220 Fed. 359 which, as we know, held a burlesque to be an infringement; and on the *Bloom* case which involved only an unsubstantial taking. [See, pp. 43-44, *supra.*] Lindley hardly helps petitioners, since he recognizes that parody may infringe. He cites no authority for any of his statements. Spring, too, recognizes that burlesque may infringe; and indicates that the test is the ordinary "fair use" test to which we have referred at pages 31-32, *supra.* The basis for DeWolfe's comment is uncertain. He cites no authority. It is obvious, however, that his dogmatic assertion goes beyond anything which has been decided on this subject.

The upshot of all this discussion can be shortly stated. Neither in England nor in this country has an appropriation of substantial copyrighted material been deemed a fair or non-infringing use. Nor, in either country, has parody or burlesque been treated as an exception to that doctrine.

III.

A Custom to Burlesque, Even if Shown to Have Existed in the Breadth Claimed, Cannot Change the Legal Effect of the Copyright Act or the Rules of Law Applicable to the Case.

Petitioners' recourse to custom as justification of their infringement is not a new tactic in this field. The short answer to contentions of that sort was given in England quite a few years ago, when, even then, they were not new:

> ". . . The plea of the existence of such custom, or habit, or practice of copying as is set up can no more be supported when challenged than the highwayman's plea of the custom of *Hounslow Heath*. It has often been relied upon as a defense in such cases, but always has been repudiated by the Courts . . ."[48]

Walter v. Steinkopff, supra [1892] 3 Ch. at 499.

Actually, the argument is irrelevant here. If the taking of substantial copyrighted material by way of parody is not a violation of the exclusive rights secured by statutory copyright there is no need to resort to the alleged custom. If, but for the practice, it would be a violation, that rule of positive law remains unaffected by the custom. "The beliefs of individuals or of a group or of a community that a rule of law is something different from what it actually

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[48]The action was for infringement of the copyright of the London Times (a morning paper) in a letter from Rudyard Kipling, which had been copied by the Gazette (an afternoon paper). The custom relied on, alleged, and assumed by the court, to have been acquiesced in and followed by the Times, was for papers to copy from each other when there was no competition between them and the source was acknowledged.

is, will not change the rule of law . . ."[44] [3 Williston, *Contracts* (rev. ed.), 1879, §651. See, also: *United States v. Pine River Logging etc. Co.*, 8 Cir., 89 Fed. 907, 915-916; *United States v. Dodson*, S. D. Cal., 268 Fed. 397, 406-407; *Avedon v. Exstein*, S. D. N. Y., 141 F. Supp. 278, 279-280.]

Even if that were not so, it would at least have to appear that the asserted custom was universally acquiesced in and that it was as broad as the conduct it is supposed to justify. Nothing of the sort appears in the instant record. Before it could be said to appear, we would have to know that parodies generally included appropriations of substantial material which was protected by copyright law at the time [see, note 7, p. 14, *supra*]; that the practice of taking it was generally acquiesced in; and that permission to take it was not gotten or thought to be necessary.[45]

The argument that "if Congress had intended that authors should be protected from having their works burlesqued or parodied" it would have so provided [Br. 50], simply ignores the whole plan and arrangement of the copyright statute. By that act the rights secured to authors were made exclusive—not merely exclusive of everyone save parodists, but *exclusive*. To give the parodist the extraordinary and preferential treatment which is

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[44]Of course, two individuals may contract in contemplation of a custom or usage, and to that extent change the application of a rule of law to that transaction. [Williston, *op. and loc. cit.*] But that is not what is or could be claimed at bar.

[45]The record here shows that even petitioner Benny obtained permission from the copyright owner for some of his parodies [R. 58-59, 61-62]; and it does not show that such permission was not gotten for the others. Historically there have been other instances. [Kitchin, *op. cit.* xviii, 213.]

claimed for him by petitioners, an express exception to that all embracing mandate would have to be found. [See, pp. 15-17, *supra*.]

Conclusion.

Nothing in the decision below places any obstacle in the way of the continued exercise of the true parodist's art. He still has, to the same extent as all other authors, "the full scope of a fair use." To be sure, he does not have, any more than has any other author, the lawful right to an unfair use. And most certainly he does not have the right to take another's property in order that he may be better able to sell cigarettes.

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX "A."

Petitioners' Television Play (2d Ed) With Material Taken From Respondents' Photoplay Deleted.

DON

. . . Yes, ladies and gentlemen, tonight the Lucky Strike Players will bring you a great psychological drama. . . . "Autolight" . . . starring Barbara Stanwyck and Jack Benny. . . .

(MUSIC.)

(AS CURTAIN OPENS, WE DISCOVER THE MAID DUSTING SOME SMALL ARTICLES ON THE MANTELPIECE.)

* * * * * * * *

(THE 1ST MAID TURNS AND SEES THE MAID ARRANGING THE TRAY ON THE TABLE.)

(MUSIC OUT.)

* * * * * * * *

MAID

The master said she ordered this for dinner.

1ST MAID

What is it?

MAID

Marinated Salami.

* * * * * * * *

1ST MAID

(LOOKING OFF.)

Sssshh . . . here she comes now. If you need me, I'll be in the pantry.

(1ST MAID EXITS AND THE MAID BUSIES HERSELF WITH THE TRAY.)

(BARBARA STANWYCK ENTERS AS MRS. MANNINGHAM.)

(APPLAUSE.)

BARBARA

Elizabeth . . . Elizabeth, I've changed my mind. I don't think I'll eat anything.

MAID

Why, Madame, don't you feel well?

* * * * * * * *

MAID

Madame, perhaps if you ate something you would feel better.

BARBARA

Yes, yes, perhaps you're right.

(SHE GOES OVER AND SITS AT TABLE.)

MAID

I know you'll enjoy your supper. It's exactly what your husband said you ordered.

BARBARA

(POINTING TO A DISH ON THE TRAY.)

What's that?

MAID

Marinated Salami.

BARBARA

Marinated Salami?

MAID

Yes, ma'am.

(PICKING UP THE TEA POT.)

Shall I pour the sour cream?

BARBARA

(JUMPING UP.)

No, no, don't pour anything. . . . Where's my husband? Why isn't he here when I need him?

SOUND (OFF) DOOR SLAMS.

MAID

Madame, I think the master just came in.

(MUSIC.)

BARBARA

Oh, good, good. Elizabeth, you may go.

(MAID EXITS. . . . BARBARA GOES TO COUCH, STANDS WITH BACK TO AUDIENCE. . . . JACK ENTERS, DRESSED IN THE PERIOD OF THE DAY, AND STANDS WITH AN OVERLY DIGNIFIED AND LOFTY AIR.)

BARBARA

Oh Charles, Charles, my husband . . . I'm so glad you're home.

(JACK CALMLY TAKES OFF HIS HAT AND PLACES IT AND COAT ON RACK, GOES OVER TO FIREPLACE.)

* * * * * * * *

BARBARA

I had to come out, Charles. It was those headaches again . . . . those awful headaches. I've been confined to my room all day . . . breakfast in bed, lunch in bed . . . I couldn't have dinner in bed, it was full of dirty dishes.

(SHE THROWS HERSELF ON THE COUCH.)

* * * * * * * *

(JACK TURNS, PULLS THE BELL CORD, AND LOOSE PLASTER FALLS FROM THE CEILING.)

* * * * * * * *

JACK

(TURNING TO ROCHESTER.)

You may go, Jeeves.

ROCHESTER

Thank you, sir. . . . May I have tomorrow off?

JACK

Tomorrow off? Why?

ROCHESTER

The cricket matches, you know.

JACK

Oh yes, yes.

ROCHESTER

Thanks, boss.

JACK

What?

ROCHESTER

Righto, Governor.

(ROCHESTER EXITS . . . BARBARA TURNS TOWARD JACK.)

* * * * * * * *

BARBARA

Wait, Charles, wait . . . Before you go, kiss me.

JACK

Very well.

(JACK GIVES BARBARA A BIG KISS.)

JACK

How was that, Bella?

BARBARA

One dimension.

(JACK LOOKS AT AUDIENCE, MAD, AND WALKS OFF.)

* * * * * * * *

(BARBARA GOES OVER TO UMBRELLA STAND, TAKES OUT AN UMBRELLA, OPENS IT UP, STEPS BACK TO THE BELL CORD, PULLS IT, AND IS DELUGED BY A DOWNPOUR OF PLASTER.)

BARBARA

Why does he leave me like this? Why? Why?

(WE SEE THE DARK FIGURE OF A MAN ENTER THE ROOM.)

BARBARA

Oh, Charles.

(SHE THROWS HER ARMS AROUND HIM AND KISSES HIM FERVENTLY.)

BARBARA

Don't ever leave me again, Charles.

(KISSES HIM AGAIN.)

Oh Charles, Charles, let me hold you closer.

(KISSES HIM AGAIN.)

Charles . . . Wait a minute . . . who are you?

BOB

If I told you I'm anybody else but Charles, I'd be crazy.

* * * * * * * *

BARBARA

Inspector, how do you know so much about this house?

BOB

I built it.

BARBARA

What?

BOB

If your husband ever asks you where Little Rock is, say Idaho.

BARBARA

I don't know what you're talking about . . . Anyway, Inspector, what are you going to do to my husband?

* * * * * * * *

(BOB GOES TO A CLOSET AT THE OTHER END OF THE WALL, OPENS IT, GOES IN, AND CLOSES THE DOOR AFTER HIM.)

BARBARA

(TO HERSELF.)

He may have to be in there for a long time. I better give him something to eat.

(SHE PICKS UP PLATE OFF THE TABLE, STEPS OVER TO THE CLOSET DOOR AND KNOCKS.)

Inspector . . . Inspector . . .

(THE OTHER CLOSET DOOR OPENS AND BOB STICKS HIS HEAD OUT.)

BOB

Did you call me?

BARBARA

Yes, I—

(TURNING.)

Wait a minute, you were in this closet.

(SHE GOES OVER TO BOB'S CLOSET.)

* * * * * * * *

BARBARA

Thank goodness. Here, in case you get hungry.

BOB

(POINTING TO TRAY.)

What is that?

BARBARA

Marinated Salami.

BOB

Oh, jolly good!

(SOUND: OFF STAGE WE HEAR THE DOOR OPENING AND CLOSING.)

BARBARA

My husband—he's coming back!

(SHE SLAMS THE CLOSET DOOR AND GOES TO SIT DOWN.)

(JACK ENTERS.)

JACK

(POINTING TO FLOOR.)

Bella, how can you be so careless as to leave this napkin on the floor?

BARBARA

I'll put it in the closet.

JACK

No, I'll do it. I'll put it in the closet.

(HE PICKS UP NAPKIN AND STARTS FOR THE CLOSET WHERE WE LAST SAW BOB AND IS ABOUT TO OPEN THE DOOR.)

BARBARA

No, no, Charles, not that closet.

JACK

Huh?

BARBARA

(POINTING TO OTHER CLOSET.)

That is the linen closet.

JACK

Very well. Oh, incidentally, Bella, I ran into Dr. Pepper today and while we were having a coke, he said—

(JACK GOES TO THE OTHER CLOSET, BOB OPENS DOOR, UNCEREMONIOUSLY SNATCHES THE NAPKIN OUT OF JACK'S HAND AND SLAMS THE DOOR SHUT. JACK STANDS LOOKING AT THE DOOR SLIGHTLY BEWILDERED.)

BARBARA

Charles, did you put the napkin in the closet?

JACK

I didn't have to, the closet reached out and grabbed it.

* * * * * * * * *

(JACK REACHES FOR THE BELL CORD AND AS HE IS ABOUT TO PULL IT, HE SUDDENLY STOPS . . . STEPS OVER TO THE ARCHWAY AND CALLS—)

Jeeves!

BARBARA

Coward

JACK

Jeeves, pack madame's bag! But before you do, bring me a brandy.

ROCHESTER

(OFF)

Yes, sir!

* * * * * * * *

(THE BUTLER ENTERS WALKING ON HIS HANDS AND BALANCING A TRAY ON HIS FEET . . . JACK CALMLY REACHES FOR THE BRANDY GLASS ON THE TRAY. HE PICKS UP THE GLASS, GULPS DOWN THE DRINK, REPLACES IT ON THE TRAY, AND THE BUTLER EXITS ON HIS HANDS.)

BARBARA

Fingerprints?

BOB

Yes.

BARBARA

The ones on the rug belong to the butler.

BOB

(TO JACK.)

Come along now.

* * * * * * * *

(SHE GOES TO THE BELL ROPE AND PULLS IT . . . BOB COMES IN AS PLASTER AND BRICKS FALL FROM THE CEILING ALL OVER EVERYTHING.)

(MUSIC AND APPLAUSE.)

APPENDIX "B."

Petitioners' Television Play (2d Ed.) With Material Supplied by Them Deleted.

. . . we're going to do the play I was talking about. Barbara Stanwyck and I will present a satire of M.G.M.'s great classic, "Gaslight." . . .

* * * * * * * *

DON

The scene is the living room on the first floor of a four-story house in a gloomy and unfashionable quarter of London in the year 1871.

(A MAID ENTERS WITH A TRAY AND PLACES IT ON THE TABLE.)

DON

Outwardly the atmosphere is one of peace, for even the servants are unaware that for the past weeks the master of the house has been systematically pursuing a sinister, diabolical scheme to drive his wife insane.

* * * * * * * *

1ST MAID

I thought the master wanted Mrs. Manningham to have supper in her room.

MAID

(SLIGHT ENGLISH ACCENT.)

He did, but she insists on eating in here . . . and if you ask me, I think she's off her trolley.

* * * * * * * *

1ST MAID

She's an odd one, all right.

MAID

The master says if she gets any worse, he's going to send her away to a—

BARBARA

It is these headaches, the frightful headaches . . . . . and my husband tells me I keep doing things I don't even remember. I can't sleep at night . . .

* * * * * * * *

I'm going mad, I tell you . . . These headaches, these awful headaches, I don't even remember ordering anything like that . . .

* * * * * * * *

(JACK ENTERS, DRESSED IN THE PERIOD OF THE DAY, AND STANDS WITH AN OVERLY DIGNIFIED AND LOFTY AIR.)

* * * * * * * *

BARBARA

The hours that you're away drag on and on. I can't live without you by my side. I need your sympathy . . . your help . . . your tender understanding.

(JACK WITH MEASURED NONCHALANCE, REMOVES HIS GLOVES, FINGER BY FINGER.)

BARBARA

Oh, my darling . . . my beloved . . . only you can guide me through the darkness of my confusion. Only you can make me smile again, laugh again, live again . . . Charles . . . Charles . . . speak to me . . . speak to me!

JACK

(WITH ARROGANT COLDNESS.)

What are you doing out of your room?

(TURNING.)

Answer me, Bella . . . What are you doing out of your room?

BARBARA

I had to come out, Charles. It was those headaches again . . . Those awful headaches . . . it was driving me mad . . . . .

* * * * * * * *

(SHE THROWS HERSELF ON THE COUCH.)

JACK

Now, now, Bella, control yourself. Now now, you're getting hysterical . . . What you need is a sedative. I'll ring for the maid.

* * * * * * * *

JACK

* * * * * * * *

Bella, while you're waiting for a sedative, why don't you just relax?

BARBARA

Yes, Charles.

JACK

Now just close your eyes and forget everything.

BARBARA

Yes, Charles.

(JACK RUSHES OVER AND TURNS A PICTURE OF WASHINGTON CROSSING THE DELAWARE UPSIDE DOWN . . . THEN GOES BACK TO LEFT OF BARBARA.)

JACK

Do you feel better now, Bella?

BARBARA

(OPENING HER EYES.)

Yes, Charles, yes.

JACK

(LOOKING AT PICTURE.)

I knew if you just sat down for a minute and relaxed, you'd feel so much . . . so much . . .

BARBARA

Charles . . . what are you staring at?

JACK

That picture . . . . that picture on the wall. Why did you turn it upside down?

BARBARA

Picture . . . upside . . . .

(TURNS, LOOKS AT PICTURE . . . . THEN BACK TO JACK.)

But I didn't . . . I didn't turn that picture upside down. It must have been someone else.

(BURIES FACE IN HANDS, CRYING.)

Oh, Charles, what's happening to me . . . what's happening to me?

* * * * * * * *

JACK

Bella . . . the other picture is upside down, too. Look!

BARBARA

No! No!

JACK

Why do you keep doing these things?

BARBARA

But I didn't! I didn't.

JACK

(BENDING OVER BARBARA.)

Bella, Bella, your mind is failing. Why don't you let me send you away? You turned the picture upside down and don't even remember.

BARBARA

(GETTING UP.)

But I didn't do it, Charles. . . . It must have been someone else.

(GOES TO FIREPLACE.)

JACK

Someone else . . . always someone else. Bella, are you suggesting that one of the maids or the butler did it?

BARBARA

(GROPING.)

Yes, yes. . . . That's it, the butler, he must have done it.

JACK

Very well, I'll find out.

(JACK STARTS FOR THE BELL CORD . . . BARBARA TAKES A STEP TOWARD JACK.)

BARBARA

Charles, don't humiliate me in front of the servants, please.

(SITS DOWN ON COUCH.)

JACK

It's the only way, Bella. I must ring for the butler.

BARBARA

Oh, Charles, if the butler didn't turn the pictures upside down, perhaps I did it, but I don't remember.

* * * * * * * *

JACK

Hmm . . . what's keeping that butler?

(CALLING.)

Jeeves . . . . Jeeves.

(ROCHESTER ENTERS.)

ROCHESTER

Cherrio. Did you ring, sir?

JACK

Yes, Jeeves . . . The pictures on the wall are upside down if you noticed it.

(POINTING TO PICTURES.)

ROCHESTER

(LOOKING AT PICTURES.)

Well, by Jove, if they ain't!

JACK

Did you do it?

ROCHESTER

Who, me?

BARBARA

Yes, Jeeves, maybe you turned them upside down when you were dusting.

* * * * * * * *

ROCHESTER

Oh, your lordship, come now!

JACK

Then I can assume that you did not turn the pictures upside down.

* * * * * * * *

(TURNING TO BARBARA.)

Did you hear that, Bella? It was you who did it.

BARBARA

But, Charles, I don't remember, I don't remember.

JACK

Don't remember . . . don't remember . . . You've been doing everything backwards . . .

* * * * * * * *

Bella, you're all mixed up. . . . Why don't you admit it . . .? Why don't you let me take care of you? Why don't you let me take care of you?

* * * * * * * *

Bella, your mind is failing and you might as well admit it.

(TURNING TO ROCHESTER.)

You may go, Jeeves.

* * * * * * * *

(ROCHESTER EXITS . . . BARBARA TURNS TOWARD JACK.)

JACK

Bella, I'm sure that now you realize you are mentally ill.

(JACK TURNS AND PICKS UP HIS HAT, CAPE, CANE, ETC.)

BARBARA

(GOING TO STAIRWAY.)

Charles . . . . Charles . . . where are you going?

JACK

I have an appointment.

BARBARA

Every night . . . every night you leave me alone . . .

* * * * * * * *

(JACK LOOKS AT AUDIENCE, MAD, AND WALKS OFF.)

BARBARA

(STARTS AFTER JACK, STOPS, TURNS BACK.)

Every night he leaves me alone. I can't stand it any longer.

These headaches, these awful headaches. I must have someone to talk to.

(CALLS.)

Elizabeth . . . Elizabeth . . . Where is that maid?

(THE LIGHTS FLICKER AND GO DIM.)

BARBARA

The lights . . . the gas lights are going dim again . . . the same as they did last night and the night before. Every time he leaves me, they go dim. Oh, why does he do this to me? If only he knew how much I love him, he'd stay here and comfort me through my hours of—

(SOUND: DOOR OPEN AND CLOSE OFF SCENE.)

BARBARA

The front door. . . . He's come back. He's come back!

(WE SEE THE DARK FIGURE OF A MAN ENTER THE ROOM.)

* * * * * * * *

BARBARA

(STEPPING BACK.)

What do you want?

BOB

I want to see you. I'm an inspector from Scotland Yard. I've come to talk to you about your husband.

BARBARA

Oh, my poor Charles . . . is he in danger?

BOB

No, but you are.

BARBARA

Me?

BOB

Yes. . . . You see, your husband is a notorious jewel thief. Fifteen years ago he murdered a woman who lived in this mansion. Then he married you so that under the guise of an English gentleman he could buy the place and search for her hidden jewels.

BARBARA

No, Inspector!

* * * * * * * *

BOB

Now as I was saying . . . Your husband is trying to drive you out of your mind so that he can send you away and then he can continue his search in the attic.

BARBARA

(GETTING UP.)

That's why the lights go dim down here. He turns the gas on in the attic.

BOB

Yes . . . then he has a secret door through which he can return to the living room and act as though nothing has happened.

* * * * * * * *

(THE LIGHTS NOW FLICKER AND GET BRIGHT AGAIN.)

(MUSIC.)

BARBARA

The lights . . . the gas lights are up again. That means my husband is coming back. . . . Quick, quick . . . get in the closet.

(BARBARA GOES TO TABLE.)

(BOB GOES TO A CLOSET AT THE OTHER END OF THE WALL, OPENS IT, GOES IN, AND CLOSES THE DOOR AFTER HIM.)

* * * * * * * *

JACK

Well, Bella, are you feeling better now?

BARBARA

Yes, Charles, my headache is all gone.

JACK

Oh.

* * * * * * * *

BARBARA

(WITH BACK TO JACK.)

Charle you're talking crazy.

JACK

No, no, Bella, you're the one who's crazy. You keep going around the house turning things upside down . . . and then you say you don't remember.

(TURNS BARBARA AROUND.)

Admit it yourself, Bella, you're losing your mind. Let me send you away. I'll have the butler pack your bag.

* * * * * * * *

ROCHESTER

(OFF)

Yes, sir!

JACK

(HE GOES BACK TO BARBARA.)

I must send you away, Bella. This evening you turned the pictures upside down. Yesterday you turned the chair upside down, the desk upside down, the table up-

side down, you kept going all around the house turning everything upside down.

* * * * * * * *

JACK

(WITH VILLAINOUS EXPECTANCY.)

Bella . . . Bella . . . didn't you notice anything different about the butler?

BARBARA

Yes, Charles, and I found out something different about you, too.

JACK

What?

BARBARA

Your game is up . . . Your scheme didn't work . . . I know who you are . . . . and what you are . . . and I know what you've been trying to do to me.

JACK

Oh, you do, eh? . . . then my dear Bella, the time is over for subtleties.

(JACK MAKES A LUNGE FOR BARBARA, FASTENS HIS FINGERS ABOUT HER THROAT AND BENDS HER OVER A CHAIR. THE CLOSET DOOR OPENS AND BOB STEPS INTO THE ROOM . . .)

BARBARA

Inspector, help me . . . . please!

BOB

What? . . . Oh, yes, yes.

(HE TOSSES THE PLATE ASIDE AND QUICKLY SUBDUES JACK.)

Unhand that woman. Mr. Manningham, I place you under arrest. Lady Bella, I shall take him to the police station and then I'll come back and search the house for fingerprints.

* * * * * * * *

BARBARA

(GETTING UP.)

Wait, before you take him away, I'd like to talk to my husband alone.

(TURNS BACK TO JACK.)

BOB

Alone. Then I better tie him to this chair.

(BOB SETS JACK IN THE CHAIR AND TIES HIS HANDS BEHIND HIM WITH THE NAPKIN.)

BOB

(To BARBARA.)

I'll be in the kitchen, if you need me.

(BOB EXITS.)

JACK

That was very clever of you, Bella, the way he fell for it.

BARBARA

What?

JACK

I'm Charles, your husband, and you love me . . . do you hear, you love me. Go, Bella, go over to that table. There's a knife there. Get it and cut me loose.

BARBARA

(CRAZILY)

Yes, yes, the knife . . . the knife.

(SHE GOES TO THE DESK, GETS THE KNIFE, STEPS BACK TO JACK, AND STANDS LOOKING AT HIM DELIBERATING.)

JACK

That's it, Bella . . . Bella, why are you standing there? . . . Cut me loose . . . Cut me loose . . . Bella, aren't you going to cut me loose?

BARBARA

(VERY DRAMATIC AND MENACING.)

Yes, Charles, I'm going to cut you *very* loose.

JACK

Bella! Bella . . . Bella . . . what are you going to do? . . . . I'm your husband. I'm Charles.

BARBARA

(KNEELING BY JACK.)

Yes, Charles, you're my husband . . . and you tried to make me believe that I was crazy. . . . Well, maybe I am.

(PUTTING THE KNIFE TO HIS THROAT.)

Maybe I am . . . But it was you who drove me to it . . . It was you who turned the pictures upside down . . . It was you who turned the lamp upside down and almost convinced me that I did it . . . Then you turned the table upside down . . . the desk upside down . . .

* * * * * * * *

JACK

Bella!

* * * * * * * *

JACK

Bella, don't kill me . . . don't kill me!

BARBARA

No, I won't kill you. That's too good for you. I'm going to let them take you away . . . INSPECTOR.

* * * * * * * *

. . . . INSPECTOR . . .

(MUSIC AND APPLAUSE.)

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of September, A. D. 1957.

9-17-57—65

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IN THE

Supreme Court of the United States

October Term, 1957
No. 90

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, and JACK BENNY,

Petitioners,

vs.

LOEW'S, INC., and PATRICK HAMILTON,

Respondents.

PETITION FOR REHEARING.

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4 Wayne Law Review (1957), p. 49, Parody of Copyright Works; Death of an Art Form?	3

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PETITION FOR REHEARING.

On March 17, 1958, after hearing this case on the merits, the Court entered a *per curiam* order affirming the judgment below by an equally divided vote. Mr. Justice Douglas did not participate.

This petition for rehearing is filed, not to reargue the merits of the case, but to suggest that another, more constructive, disposition of the matter may be open to the Court. This case ultimately involves two distinct questions—one of law and one of fact. The legal question relates to the proper standards to be applied in testing the infringement of a copyrighted work by any parody or burlesque: whether, as held by the courts below, the art of parody must be treated as a species of plagiarism and

its practitioners limited to the use of only such insubstantial copyrighted matter as is permitted the literary thief, or whether, as contended by petitioners, the parodist has at least some right to use matters of substance under the doctrine of fair use. The factual question is whether, tested by the correct legal standard, this particular parody, "Autolite," infringed this particular copyrighted work, "Gaslight."

It does not appear from the action of the Court whether the equal division of the Justices was upon the issue of law or upon the issue of fact. It is possible, we believe, that there may have been a majority for a particular decision on the issue of law. For instance, a majority may have concluded that parody should not be limited to an insubstantial use of copyrighted material but rather is entitled to the full benefit of the doctrine of fair use. The equal division may have been attributable solely to the issue of fact.

If this be the case, we suggest that it would not be improper—indeed it would be consistent with the usual practice—if the Court would render an opinion on the law, leaving to the trial court its customary task of applying that law to the facts, including the duty of selecting between such conflicting inferences as may be drawn from the evidence. See *Marconi Wireless Telegraph Co. of America v. Simon*, 246 U. S. 46; *Universal Camera Corp. v. Labor Board*, 340 U. S. 474; *Rayonier, Inc. v. United States*, 352 U. S. 315. In short, if a majority of the Court is in agreement on the important question of law presented here, those views could be announced and the case remanded to the trial court for consideration in light of the applicable legal principle.

We suggest the possibility of such a disposition because of the importance of a determination of the legal question. That substantial public benefit was to be expected from the anticipated authoritative determination of this legal issue has been expressed not only by legal commentators[1] and spokesmen for the particular industries involved,[2] but by those primarily interested in the advancement of literature and the arts.[3] That issue is now "left unresolved." *Cf. Peters v. Hobby*, 349 U. S. 331, 333 (1955).

While this Court's affirmance technically may not be authority for determination of cases in other circuits, nevertheless the harsh and constricting rule of law enunciated by the court below will be binding in the Ninth Circuit, where a great bulk of the cases involving this issue may be expected to arise.[4] Furthermore, as has so aptly been said, the silence of this Court may itself "chill the warmth of parody's laughter at a time when we seem to need it the most."[5]

For these reasons petitioners request that a rehearing be granted for the purpose of rendering an opinion which will enunciate the principles of law applicable in this

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[1]See *e.g.* "Parody of Copyrighted Works; Death of an Art Form?" 4 Wayne L. Rev. 49 (1957).

[2]See *e.g.* Sponsor Magazine, February 15, 1958, page 36.

[3]Charles Poore, "Ardent Plea for the Art of Parody," New York Times Supplement, March 9, 1958.

[4]*Cf., Bailey v. Richardson*, 182 F. 2d 46 (1950), affirmed by an equally divided Court, 341 U. S. 918 (1951), followed in *Haynes v. Thomas*, 232 F. 2d 688, 690 (1956); *Kutcher v. Gray*, 199 F. 2d 783, 789 (1952).

[5]Charles Poore, "Books of the Times," New York Times, March 20, 1958. See also Time Magazine, March 31, 1958, p. 40.

field, vacating the judgment below, and remanding the case to the trial court.

Respectfully submitted,

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March, 1958.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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